TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 713

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

UNITED STATES EX REL. G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS, ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 28, 1925

CERTIORARI GRANTED OCTOBER 26, 1925

(31436)

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1 [Caption omitted]

In Supreme Court of the District of Columbia

UNITED STATES, EX RELATIONE, G. THOMAS BIRKENSTOCK and Gerald Ronon, executors of the last will of Margaret Murphy, deceased, petitioners, vs. DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, respondent.	At Law No. 69285

Petition for writ of mandamus

Filed September 3, 1924

The petition of G. Thomas Birkenstock and Gerald Ronon, executors of the last will of Margaret Murphy, deceased, respectfully represents to the court as follows:

1. The petitioners, G. Thomas Birkenstock and Gerald Ronon, both of Philadelphia, Pennsylvania, are the executors of the last will and testament of Margaret Murphy, late of Overbrook, Pennsylvania, who died on December 27, 1923, letters testamentary having been granted to petitioners on December 31, 1923, by the register of wills of Montgomery County, Pennsylvania.

2. The respondent, David H. Blair, is Commissioner of Internal Revenue of the United States and is charged by law with the duty of refunding and paying back all income taxes erroneously or illegally collected (revenue act of 1924, section 1011), with interest on the amount of such refund at the rate of 6 per centum per annum from the date the tax was paid to the date of the allowance of the refund in accordance with the following provision of the revenue act of 1924:

"SEC. 1019. Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at
2 the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or, in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

3. The testatrix, Margaret Murphy, paid to the collector of internal revenue at Philadelphia, as her income tax for 1919, $22,239.23 on April 13, 1920, $22,239.23 on June 10, 1920, $22,239.23 on Sep-

tember 27, 1920, and $22,239.23 on December 13, 1920, or a total of $88,956.92 income tax paid by her for 1919.

4. The respondent subsequently determined that testatrix' income tax for 1919 should only have been $53,902.07, and that $35,054.84 had therefore been erroneously or illegally collected; and having also ascertained that testatrix did not owe to the United States any other taxes against which such $35,054.84 or any part thereof should be credited, respondent, on or about August 20, 1924, approved and signed a schedule addressed to the disbursing clerk of the Treasury Department in which he allowed the sum of $35,054.85 as refundable and authorized its payment, with interest thereon of $1,057.41, although payment of neither of these amounts has as yet actually been received.

5. The interest of $1,057.41 thus authorized represents interest at 6 per centum per annum on $35,054.84 for less than seven months whereas under the law (revenue act of 1924, section 1019) interest should have been authorized and should be paid for at least three years and five months on the entire amount of the proposed refund and for even longer periods on portions thereof.

6. Each of the four installments of the testatrix' income tax for 1919 recomputed as provided by law (revenue act of 1918, section 250 (b), 40 Stat. 1083) would be $13,475.52, whereas four installments of $22,239.23 each were actually paid as more fully set forth in paragraph 3 of this petition. Interest should therefore be allowed and paid on $8,763.71 from April 13, 1920, on $8,763.71 from June 10, 1920, on $8,763.71 from September 27, 1920, and on $8,763.71 from December 13, 1920, in each case at least until on or about August 20, 1924.

7. The petitioners, after inquiring at the office of respondent and being advised that interest had been authorized only in the amount of $1,057.41, thereupon on or about August 25, 1924, made through their attorney the following formal demand upon the respondent to authorize and direct the payment of the additional interest to which petitioners in their capacity as executors are entitled under the law:

JAMES CRAIG PEACOCK,
ATTORNEY AND COUNSELLOR AT LAW,
ALBEE BUILDING, 15TH AND G STREETS NW.,
Washington, D. C., August 25, 1924.

Honorable DAVID H. BLAIR,
Commissioner of Internal Revenue.

DEAR SIR: Reference is made to the refunds of overpayments of income tax due 1919 which are being made to three of my clients in the following amounts: Margaret Murphy, Philadelphia, Pa., $35,054.84; John A. Murphy, Philadelphia, Pa., $5,655.37; and Joseph L. Murphy, Philadelphia, Pa., $3,843.50.

These amounts were originally listed as overassessments and sent to the collector at Philadelphia on Schedule #10274 on or about May 19, 1924, and I understand that a schedule authorizing and allowing

the same amounts as refundable was forwarded to the disbursing officer on or about August 12, 1924.

I am, however, advised by your office that interest has been computed and authorized only in the following amounts: Margaret Murphy, $1,057.41; John A. Murphy, $170.59; and Joseph L. Murphy, $115.94. These amounts are obviously computed from the date six months after the filing of the several claims for refund to May 19, 1924.

It is my understanding that under section 1019 of the revenue act of 1924 a claim for refund is not allowed until it is paid, or that in any event it is not allowed until the schedule authorizing and allowing the amount as refundable is signed by the commissioner and sent to the disbursing officer, which in the above cases apparently occurred on or about August 12, 1924.

In accordance with the provisions of section 1019 of the revenue act of 1924 interest should therefore be paid in each of the above cases from the date of the original payment of the tax to the date of the payment of the refund or in any event from the date of the original payment of the tax to the signing of the schedule authorizing and allowing the amounts as refundable, which in these cases was on or about August 12, 1924. In behalf of the above-mentioned clients I ask you to authorize and direct the disbursing officer to pay to the said taxpayers the additional interest which should be allowed and paid to them on these refunds. It would be greatly appreciated if you would advise me at your early convenience whether this request will be acceded to. Powers of attorney to the undersigned from all of the above-mentioned taxpayers are on file in your office.

Very truly yours,

(Signed) JAMES CRAIG PEACOCK.

JCP/mad

but the respondent under date of August 29, 1924, made the following formal refusal to comply therewith:

TREASURY DEPARTMENT,
Washington, August 29, 1924.

IT:R:CC:ECW

Mr. JAMES CRAIG PEACOCK,
Albee Building, 15th & G Streets, Washington, D. C.

In re: Margaret Murphy, John A. Murphy, Joseph L. Murphy, Philadelphia, Pa.

SIR: Reference is made to your letter dated August 25, 1924, in which it is stated that in your opinion interest should be allowed under section 1019 of the revenue act of 1924, on amounts refunded to the above-named taxpayers in connection with Schedule IT:A–10274, from the dates of payment of the tax to August 12, 1924, on
4 or about which date you state the schedule authorizing and allowing the amounts as refundable was sent to the disbursing office of the department.

In reply you are informed that the overassessment referred to were allowed on a schedule signed by the commissioner on May 19, 1924. It is held, therefore, that the allowance of interest on the amounts refunded is governed by the provisions of section 1324-a of the revenue act of 1921.

Such section 1324-a of the act of 1921 provides:

"That upon the allowance of a claim for the refund of or credit for internal revenues taxes paid, interest shall be allowed and paid * * * to the date of such allowance,"

and section 1019 of the revenue act of 1924 similarly provides for the payment of interest to the date of allowance. It has been consistently held by the department that these provisions fixing the termination of the interest period are to the same effect in both acts and, therefore, interest is payable to the date of the schedule upon which the overassessment is allowed.

For the foregoing reasons you are informed that the interest allowances made in the cases in question are apparently correct.

Respectfully,

(Signed) J. G. BRIGHT,
Deputy Commissioner.

8. The petitioners further allege that demand having been made by the respondent to authorize and direct payment of the additional interest due to them and such demand having been refused, this action on the part of the respondent was unwarranted under the revenue act of 1924, and the computation, allowance, and authorization of interest by the respondent being a ministerial act required of him by law and not necessitating any exercise of discretion, petitioners are entitled to relief in this court.

9. The petitioners state that prior to their coming into this court they have exhausted all the remedies open to them to obtain the authorization and allowance by the Commissioner of Internal Revenue of the additional interest due to them under the revenue act of 1924, and that their requests have been unlawfully and unjustly denied, and that there is no other course open to them but to petition this court.

Wherefore, the premises being considered, the petitioners pray:

1. That a rule may issue directing the respondent to appear before this honorable court and show cause, if any there be, why a writ of mandamus should not be issued commanding and directing respondent to compute and allow interest at the rate of six per centum per annum on $8,763.71 from April 13, 1920, on $8,763.71 from June 10, 1920, on $8,763.71 from September 27, 1920, and on $8,763.71 from December 13, 1920, in each case to August 20, 1924, and to authorize and direct the proper disbursing officer to pay to the petitioners the amount by which the sum of such four items of interest exceeds $1,057.41.

2. That a writ of mandamus may issue to said respondent, commanding and directing him to compute and allow interest at the rate of six per centum per annum on $8,763.71 from April 13, 1920, on $8,763.71 from June 10, 1920, on $8,763.71 from September 27, 1920, and on $8,763.71 from December 13, 1920, in each case to August 20, 1924, and to authorize and direct the proper disbursing officer to pay to the petitioners the amount by which the sum of such four items of interest exceeds $1,057.41.

3. For such other and further relief as the nature of the petition may require.

G. THOMAS BIRKENSTOCK and GERALD RONON,
Executors of the last will of Margaret Murphy, deceased.
By JAMES CRAIG PEACOCK,
Attorney for Petitioners.

[Duly sworn to by G. Thomas Birkenstock and Gerald Ronon; jurat omitted in printing.]

JNO. W. TOWNSEND,
Of Counsel.

In Supreme Court of District of Columbia

Rule to show cause

Filed September 3, 1924

* * * * * * *

Upon consideration of the petition of G. Thomas Birkenstock and Gerald Ronon, executors of the last will of Margaret Murphy, deceased, filed in the above-entitled cause on the 3rd day of September, 1924, it is by the court this 3rd day of September, 1924,

Ordered, that the respondent, David H. Blair, Commissioner of Internal Revenue of the United States, appear in this court at ten o'clock a. m. on the 19th day of September, 1924, and show cause, if any he have, why the prayer of said petitioners should not be granted and a writ of mandamus issued against him as therein prayed; provided, however, a copy of this order be served upon said respondent on or before the 6th day of September, 1924.

By the court:

F. L. SIDDONS,
Justice.

Marshal's return. Filed September 16, 1924

Served a copy of the within rule on David H. Blair, Com. Int. Revenue, personally: 9/3/24.

E. C. SNYDER,
U. S. Marshal.

F

6 In Supreme Court of District of Columbia

Answer. Filed September 29, 1924

* * * * * * *

David H. Blair, Commissioner of Internal Revenue, respondent herein, now and at all times saving and reserving unto himself the benefit of all manner of objections and exceptions as to the errors and insufficiencies in the petition filed herein, and reserving unto himself the lack of jurisdiction of the court appearing on the face of said petition to grant the relief prayed for and the lack of jurisdiction of the court to direct him as Commissioner of Internal Revenue to perform the act or acts in question, and relying on the same as if motion to dismiss had been sufficiently interposed, nevertheless, answering so much and such parts of the petition and the rule to show cause as he is advised it is material and necessary for him to make answer unto, says as follows:

1. He admits the allegations of paragraph 1.

2. While admitting that he is Commissioner of Internal Revenue of the United States, he says that he is advised that the other allegations of paragraph 2 amount to mere conclusions of law and need not be answered.

3. He admits that the testatrix, Margaret Murphy, paid to the collector of internal revenue at Philadelphia as her income tax for the year 1919 a total sum of $88,956.92 and that said sum was paid in four installments of $22,239.23 each, but he avers that the installments were paid on April 15, 1920; June 16, 1920; September 15, 1920; and December 15, 1920, instead of the dates shown in paragraph 3.

4. Respondent denies the allegations of paragraph 4, except as herein expressly admitted.

He admits that subsequent to the dates mentioned in paragraph 3 of the petition he determined that testatrix' income tax for 1919 should only have been $53,902.07 and that $35,054.85 had therefore been erroneously or illegally collected.

He admits that he ascertained that testatrix did not owe to the United States any other taxes against which such $35,054.85 or any part thereof should be credited.

Respondent is without knowledge as to whether payment has actually been received by petitioners of the said sum of $35,054.85 with interest thereon of $1,057.41, but avers that check No. 471972 for the sum of $35,054.85 with interest thereon of $1,057.41 was issued and mailed under date of August 25, 1924.

5. He admits that the interest of $1,057.41 thus authorized represents interest at six per centum per annum on $35,054.85 for less than seven months, and further answering avers that interest included in said check No. 471972 was computed at six per centum per annum from November 18, 1923, six months after the date of

filing of testatrix' claim for refund to May 19, 1924, the date of allowance of refund.

As to each and every other allegation of paragraph 5 he says that he is advised that they amount to mere conclusions of law and need not be answered.

7 6. He admits that four installments of $22,239.23 each were actually paid by testatrix as set forth in paragraph 3 of the petition. He is advised that the remaining allegations of paragraph 6 are conclusions of law which he is not required to answer.

7. Respondent admits the authenticity of the copy of a communication dated August 25, 1924, addressed to him as Commissioner of Internal Revenue by James Craig Peacock but denies that the petitioners are entitled under the law to the additional interest claimed therein. He admits also the authenticity of the copy of a communication dated August 29, 1924, addressed to Mr. James Craig Peacock by J. G. Bright, deputy commissioner.

8. He admits that the demand made by petitioners on him to authorize and direct the payment of additional interest was refused, but as to each and every other allegation of paragraph 8, he says that he is advised that they amount to mere conclusions of law and need not be answered.

9. He denies that the petitioners prior to their coming into this court in their attempt to obtain the authorization and allowance by the Commissioner of Internal Revenue of the additional interest claimed have exhausted all the remedies open to them.

Further answering, he says that he is advised and believes that if petitioners are entitled under the law to any additional interest on the amount of money refunded to them their right of action is by a suit against the United States in the Court of Claims or the proper district court of the United States; and that having such right to sue in the United States in an ordinary action at law, they are not entitled to relief by writ of mandamus.

As to each and every other allegation of paragraph 9 he says that he is advised that they amount to mere conclusions of law and need not be answered.

Further answering, he avers that the petitioners in this form of proceeding are seeking to review a decision rendered by the respondent in the course of administering the internal revenue laws of the United States; that such decision involved the exercise of judgment and discretion, and having acted in accordance with law in a matter involving the exercise of judgment and discretion, the petitioners can not by writ of mandamus compel him to change his judgment or reverse his action in said case.

He further avers that whatever action he has taken in this case was taken as an officer of and in the interests of the United States of America; that the United States of America is an indispensable party to this action; that the authority of the respondent as Commissioner of Internal Revenue is prescribed and limited by law and that

the laws of the United States prescribe when and under what conditions interest on taxes, erroneously and illegally collected and later refunded, is to be paid.

Respondent avers that the testatrix, on May 18, 1923, filed with the collector of internal revenue for the 1st district of Pennsylvania a claim for refund of alleged overpaid income taxes for the year 1919 in the sum of $35,054.85; that the said claim was examined in the office of the Deputy Commissioner of Internal Revenue; that the overassessment or reduction of tax liability revealed thereby, namely, $35,054.85, was recommended by the deputy commissioner to the respondent for allowance on May 19, 1924.

8 Respondent further avers that on May 19, 1924, in accordance with authority contained in the revenue act of 1921, he affixed his signature to a schedule of overassessments and allowance of abatements, credits, refunds, and related claims, numbered IT–A–10274, containing under item 29 after her name, $35,054.85, the amount of the refund claimed by the testatrix, thereby signifying for the first time in writing his allowance of the refund to which testatrix was entitled or his allowance of the claim of testatrix for refund, and thereby giving certain instructions to the collector of internal revenue for the 1st district of Pennsylvania with respect thereto.

Answering further, the respondent avers that the collector for the 1st district of Pennsylvania entered on said schedule, in the last column thereof, the said sum of $35,054.85 and returned the said schedule to Washington; that the said collector relisted the amount shown in the last column of schedule IT–A–10274 on a subsidiary schedule known as schedule of refunds and credits and numbered IT–R–10274, with the statement, signed June 30, 1924, that "the items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit."

For further answer the respondent avers that he signed, under date of August 12, 1924, the authorization addressed to the disbursing clerk, Treasury Department, which appears on said schedule IT–R–10274, and which reads as follows:

"The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may therefore be made in the amounts shown in column 7."

The respondent avers that he allowed testatrix' claim for refund under date of May 19, 1924; that such refund was allowed in accordance with the provisions of the revenue act of 1921, and before the passage of the revenue act of 1924.

He is advised and therefore avers that the revenue act of 1921, under which he made the said allowance, does not, nor do any prior or subsequent acts of Congress, authorize him to pay the additional interest claimed by the petitioners to be due.

Further answering, the respondent avers that section 1324 (a) of the revenue act of 1921 provides when and under what conditions interest may be allowed and paid on a refund of internal revenue taxes made under that act and reads as follows:

"SEC. 1324 (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) If such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no
9 protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment,' as used in this section, means a further assessment for a tax of the same character previously paid in part."

He is advised and therefore avers that the foregoing section of the revenue act of 1921 does not authorize him to pay the additional interest claimed by the petitioners to be due, nor does any other section of any other revenue act. In accordance with section 1303 of the revenue act of 1921 the respondent with the approval of the Secretary of the Treasury promulgated Article 1040 of Regulations 62 which defines when a claim for refund is allowed.

"* * * A claim for refund or credit is allowed within the meaning of the statute when the commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund * * *."

Respondent is advised and therefore believes that said regulation does not authorize him to pay the additional interest claimed by the petitioners to be due.

He avers that the foregoing section 1324 (a) of the revenue act of 1921 provides for the payment of interest upon the total amount of the refund from the time when such tax was paid, only if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest. He further avers that the testatrix did not pay the income tax for 1919 referred to in paragraph 3 of the petition under a specific protest setting forth in detail the basis of and reasons for such protest.

Respondent is advised and believes, and therefore charges, that the petitioners have no right under the internal revenue laws and regulations to the additional interest claimed in their petition.

Wherefore, having made full and complete answer to the petition, as well as return to the rule to show cause, he prays that said rule may be discharged, that petition may be dismissed, that he may recover his reasonable costs, and that he be permitted to go hence without day.

DAVID H. BLAIR,
Commissioner of Internal Revenue.

[*Duly sworn to by David H. Blair; jurat omitted in printing*]

PEYTON GORDON,
United States Attorney.
VERNON E. WEST,
Assistant United States Attorney.
Attorneys for respondent.

10 *Amendment to answer and order allowing filing of same. Filed October 20, 1924*

* * * * * * *

Comes now the respondent, David H. Blair, Commissioner of Internal Revenue, and by leave of the court amends his answer herein filed as follows:

After the words "numbered IT–A–10274" on line 11 of the fourth page of the answer insert

"a photostat copy of which schedule marked 'Exhibit A' is attached hereto and made a part hereof."

After the words "numbered IT–R–10274" on line 22 of the fourth page of the answer insert

"a photostat copy of which schedule marked 'Exhibit B' is attached hereto and made a part hereof."

DAVID H. BLAIR,
Commissioner of Internal Revenue.

[*Duly sworn to by David H. Blair; jurat omitted in printing*]

PEYTON GORDON,
United States Attorney.
VERNON E. WEST,
Assistant United States Attorney.
Attorneys for respondent.

Fiat of Justice Stafford

Leave to file within amendment is hereby granted.

WENDELL P. STAFFORD,
Justice.

I consent.

JAMES CRAIG PEACOCK,
Attorney for Petitioners.

EXHIBIT A

2425

-425

TREASURY DEPARTMENT
U. S. INTERNAL REVENUE SERVICE
FORM 7780
Form approved by Comptroller General
Feb. 1, 1923

IMMEDIATE

This schedule must be executed and all required steps taken without delay.

COMMISSIONER OF INTERNAL REVENUE.

SCHEDULE OF OVERASSESSMENTS
AND
ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

ORIGINAL
Number in General Accounting Office

Schedule No. IT-An 10274

1st PE. MAY 20 1924

Sheet 1 of 2 sheets

INCOME TAX UNIT

INT. REV.

District of PENNSYLVANIA

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the probable facts and the law. The assessments or reductions in tax liability appearing in column 4 are respectively recommended for allowance.

July 19 24

Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Collector FIRST District of PENNSYLVANIA

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificate of Overassessment" or "Notice of Abatement or Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be credited, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries on your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7782-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7782-A) referred to above, and an appropriate warrant authorized upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7782-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date MAY 19 24

Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date June 30, 1924

1st. District of Pa.

Collector.

ACCOUNTS UNIT
Read not entered

INITIALS	DATE
SW	7/26/24

736.30 (Entries to be made by the Collector)

(1) Item No.	(2) Certificate of Overassessment or Claim Number	(3) Name and Address of Taxpayer	(4) Overassessments or Reductions of Tax Liability (Amount)	(5) Ledger, Page and Line, or Account Number	(6) Taxable Year	(7) Abatement (Amount)	(8) Overassessment (Amount)	(9) Credit (Amount carried to Form 7782-A)	(10) Account Credited: Ledger, Page, and Line	(11) Due Date of Item Against Which Credit Was Made	(12) Net Amount Refundable Carried to Form 7782-A	(13) Remarks
X	X X	TOTALS OF 32 ITEMS IN THIS SCHEDULE		X X X	X				X X X	X X		X X
1	663790	Abbott, Edwin M.	10 00		21		10 00				10 00	O.A.
2	663791	Abercrombie, F. P.	20 00		21		20 00				20 00	O.A.
3	663794	Adams, Paul G.	12 79		21		12 79	12 79	1925 9316904	12/15/25		O.A.
4	663795	Adams, W. S.	20 00		21		20 00				20 00	O.A.
5	663803	Allison, Walter A.	20 00		21		20 00				20 00	O.A.
6	663806	Ancker, Harry G.	30 00		21		30 00				30 00	O.A.
7	663807	Anderson, Solon E.	18 56		21		18 56				18 56	O.A.
8	663811	Arigo, Charles	30 34		21		30 34				30 34	O.A.
9	663810	Armon, Aaron	20 00		21		20 00				20 00	O.A.
10	663812	Arms, Robert L.	20 00		21		20 00				20 00	O.A.
11	449893	Barnes Coal Co.	7,687 91	3/31/17			7687 91				7687 91	
12	663746	Baird, Maggie R.	110 01		21		110 01				110 01	O.A.
13	663744	Barrist, David	32 04		21		32 04				32 04	O.A.
14	663762	Bittong, ~~Axx~~ R. Arthur	27 00		21		27 00				27 00	O.A.
15	125635	Eastwood, William J.	47 31		19		47 31				47 31	
16	663763	Estate of Alexander J. Cassatt ~~Fidelity Trust~~	583 06		19		583 06				583 06	O.A.
17	653090	Keylor, J. M.	406 55		18		406 55	112 68 24 92	1925 9307850 1925 Sept. 800203	12/15/25 9/1/25	317 45	
18	40986	Lewistown & Reedsville Electric Railway Co.	373 99		13		373 99	21 29	1924-048876	12/15/24	373 99	
19	663851	Mills & Bros., Thos.	31 30	11/30/20			31 30				31 30	O.A.
20	663854	Mitchell, G. P.	10 00		20		10 00				10 00	O.A.
21	663833	Maguire, Daniel J.	20 00		20		20 00				20 00	O.A.
22	663714	Marcus & Co.	541 16		19		541 16	541 16	1924 May 005 p1.4	5/19/24		O.A. 368-M Item
23	663821	Maron, Laura	10 00		20		10 00				10 00	O.A.
24	663844	Montgomery Trust Co.	1,109 85		19		1109 85				1109 85	O.A.
25	663845	Montgomery Trust Co.	163 53		20		163 53				163 53	O.A.
X	X X	PAGE TOTALS ONLY		X X X	X				X X X	X X		X X

10.9

TREASURY DEPARTMENT
U. S. INTERNAL REVENUE SERVICE
(Form 7966 (Continuation Sheet))
Form approved by Comptroller General
Feb. 4, 1925

1st Pa.

SCHEDULE OF OVERASSESSMENTS
AND ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

ORIGINAL
Voucher to General Accounting Office

INITIALS

Schedule No. 72-A-10
Continuation Sheet No. 2

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Overassessment or Reduction of Tax Liability (Amount) (4)	Ltr., Page and Line, or Delivery Number (5)	Taxable Year (6)	(Entries to be made by the Collector) Abatement (Amount) (7)	Overpayment (Amount) (8)	Credit (Amount carried to Form 7966-A) (9)	Account Credited: Ltr., Page, and Line (10)	Due Date of Item Against Which Credit Was Made (11)	Net Amount Refunded Carried to Form 7966-A (12)	Remarks (13)
26	663846	Montgomery Trust Co.	104 63		21		104 63				104 63	O.A.
27	546309	Murphy, John A.	5,655 37		19		5655 37				5655 37	
28	546310	Murphy, Joseph L.	3,843 50		19		3845 50				3845 50	
29	552922	Murphy, Margaret	35,054 85		19		35054 85				35054 85	
30	649591	Peckitt, Leonard	1,350 98		17		1350 98				1350 98	
31	650945	Sweeten Wilmington Co.	30 01		17		30 01	1 23	26 1924 July Tax	10/20/25 Transfer	6 78	O.A.
32	663739	Villa Villa Amusement Co.	77 26		21		77 26				77 26	O.A.
X	X X	PAGE TOTALS ONLY		X X X	X				X X X	X X		X X

INTERNAL REVENUE-BUREAU
JUL 17 1926
RECEIVED
Treasury Department
Internal Revenue Service

QAA

10-B

10c

TREASURY DEPARTMENT
U. S. INTERNAL REVENUE SERVICE
Form 7206-A
Form approved by Comptroller General
Feb. 2, 1928

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

EXHIBIT B

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office

Schedule No. IT-R-10274

Sheet 1 of ..... Sheets.

First Dist. of Penna.

D. C. Voucher No. 262

UNIT	NOTATIONS	DATE
Ark	Ky	8/30/24

27

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are related as they appeared for refund or credit on an original schedule (bearing the serial number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or collections of tax liability subject to refund or credit.

Date June 30, 1924

R. S. Buckingham
Collector, First District of Pennsylvania

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 6 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 9 has been provided

Date AUG 16 1924

Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 6 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 9 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date AUG 17 1924

O H Blair
Commissioner of Internal Revenue.

Item No.	Certificate of Overassessment or Claim Number	Name and Address of Taxpayer	Tax Account Reference	Amount Overassessed	(Not to be used by Collector) Interest Accrued	(Not to be used by Collector) Tax Refundable	Date or Final Determinations of Appeals from which Overassessments Resulted and Overassessments Period	(Not to be used by Collector) Refundable Taxes Illegally Collected 1917 and Prior Years	19__	19__	Paid by Disbursing Clerk, Treas. Dept., by Checks Dated	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	Numbered as Follows:	
X	X X	Totals of 29 Items in this Schedule	5384		3358	2,741 36	X X	5,741 36			AUG 25 1924 X X	X X

94024—26 (Face page 10.) No. 3

10d

TREASURY DEPARTMENT
U.S. INTERNAL REVENUE SERVICE

INCOME TAX UNIT

SCHEDULE OF REFUNDS AND CREDITS

ORIGINAL
Voucher to General Accounting Office

INITIALS

Schedule No. [illegible]

Continuation Sheet No. 2

Page No. (1)	Classification or Other Identification No. (2)	NAME AND ADDRESS OF TAXPAYER (3)	Net Amount Refunded (4)	Amount Credited (5)	(Not to be used by Collector) Interest Allowed (6)	(Not to be used by Collector) Total Refundable (7)	Date on Which Payment Was Made (8)	(Not to be used by Collector) REFUNDING TAXES ILLEGALLY COLLECTED 1925 and Prior Years (9)	(10)	(11)	Paid by Treasurer's Check, Treas. Dept., or Credited Date (12)	REMARKS (13)
29	552922	Murphy, Margaret	35054 85		1057 41	36112 26	12/15/20	36112 26			47197	

X X X Page Total Only 36982 [illegible] 1113 38 [illegible] 7 [illegible] X [illegible] X X X X

94024—26. (Face page 10.) No. 4

11 In Supreme Court of District of Columbia

Demurrer

Filed October 20, 1924

* * * * * * *

The petitioners say that the respondent's answer and the amendment thereto are bad in substance, for the following reasons:

1. The refund was not allowed until after June 2, 1924, and interest should therefore be computed as provided by section 1019 of the revenue act of 1924 from the dates tne installments were paid to August 25, 1924, or in any event to August 12, 1924.

2. A writ of mandamus should issue to respondent commanding and directing him to so compute and authorize the payment of interest.

JAMES CRAIG PEACOCK,
JNO. W. TOWNSEND,
Attorneys for Petitioners.

In Supreme Court of District of Columbia

Notice of Leaving of Demurrer

To PEYTON GORDON and
VERNON E. WEST, Esquires,
Attorneys for Respondent.

SIRS: Please take notice that the foregoing demurrer will be for hearing before Mr. Justice Stafford in Circuit Court Number Two on Friday, October 24, 1924, at 10 o'clock a. m., or as soon thereafter as counsel may be heard.

JAMES CRAIG PEACOCK,
JNO. W. TOWNSEND,
Attorneys for Petitioners.

In Supreme Court of District of Columbia

Amendment to answer and order allowing filing of same. Filed October 31, 1924

* * * * * * *

Comes now the respondent, David H. Blair, Commissioner of Internal Revenue, and by leave of the court amends his answer herein filed as follows:

By striking out the fourth sentence of paragraph four, beginning with the word "Respondent" on line 13 of the second page of the answer and ending with the figures "1924" on line 17 of the second page of the answer and inserting in the place thereof the following:

"Respondent is advised and therefore believes that payment has actually been received by petitioners of the said sum of $35,054.85 with interest thereon of $1,057.41, and avers that check No. 471972 for the sum of $35,054.85 with interest thereon of $1,057.41 was issued and mailed under date of August 25, 1924, to the petitioners and that said check was duly presented to the Treasurer of the
12 United States for payment and was paid by the said Treasurer under date of September 22, 1924."

DAVID H. BLAIR,
Commissioner of Internal Revenue.

[*Duly sworn to by David H. Blair; jurat omitted in printing*]

PEYTON GORDON,
United States Attorney,
VERNON E. WEST,
Assistant United States Attorney,
Attorneys for Respondent.

Fiat of Justice Bailey

Leave to file within amendment is hereby granted.

JENNINGS BAILEY,
Justice.

In Supreme Court of District of Columbia

Memorandum on demurrer. Filed January 2, 1925

* * * * * * *

I think that the action of the commissioner on May 19, as shown on Schedule I. T. A–10275, was in effect an opinion that the refund should be allowed. It was clearly within his power to modify or reverse this action up to the time of his final confirmation by his signature on the schedule after its receipt from the collector, and at this time the claim for refund was finally allowed.

The payment of interest as fixed by the statute thereupon became a mere ministerial duty and mandamus lies.

The demurrer to the answer and amendments will be sustained.

BAILEY, *J.*

In Supreme Court of District of Columbia

Minute entry of order sustaining demurrer

FRIDAY, JANUARY 2D, 1925.

Session resumed pursuant to adjournment, Mr. Justice Bailey presiding.

* * * * * * *

Upon consideration of the demurrer of petitioners filed herein, to respondent's answer and amendments thereto, it is ordered that said demurrer be, and the same is hereby, sustained.

13 *Minute entry of judgment*

WEDNESDAY, JANUARY 21, 1925.

Session resumed pursuant to adjournment, Mr. Justice Bailey presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record and thereupon, respondent by his attorneys, states to the court that he does not care to amend but will stand upon his answer, to which the court sustained a demurrer on the 2d day of January, 1925.

Wherefore, it is considered that the prayers of the petition be granted, that the writ of mandamus issue as therein prayed and that the petitioners recover of respondent their costs of suit, to be taxed by the clerk, and have execution.

From the foregoing judgment the respondent by his said attorneys in open court, notes an appeal to the Court of Appeals of the District of Columbia.

In Supreme Court of District of Columbia

Assignments of error. Filed February 4, 1925

* * * * * * *

Now comes the respondent, David H. Blair, Commissioner of Internal Revenue, by and through his attorney, Peyton Gordon, United States attorney in and for the District of Columbia, and assigns as error the following:

1. The court erred in entering judgment herein granting a writ of mandamus as prayed in the petition.

2. The court erred in sustaining petitioners' demurrer to respondent's answer and amendments.

3. The court erred in not overruling petitioners' demurrer to respondent's answer and amendments.

4. The court erred in holding that the approval by respondent on August 12, 1924, of the schedule form No. IT–R–10274 (respondent's Exhibit B), was the allowance of petitioners' claim for refund within the meaning of sec. 1324 of the revenue act of 1921.

5. The court erred in not holding that the approval by respondent on May 19, 1924, of the schedule form No. IT–A–10274 (respondent's Exhibit A) was the allowance of petitioners' claim for refund within the meaning of sec. 1324 of the revenue act of 1921.

6. The court erred in not holding that the acceptance by the petitioners of the principal sum allowed as a refund by the respondent, with interest, precludes them from claiming additional interest in this proceeding.

7. The court erred in not holding that petitioners have an adequate and complete remedy other than by mandamus proceedings to enforce their rights, if any they have.

8. The court erred in not holding that the construction placed upon sec. 1324 of the revenue act of 1921, by respondent, was a reasonable one and within the discretion reposed in him by law.

14 9. The court erred in holding that petitioners are entitled to interest from the dates of the payments of the instalments of their decedent's 1919 tax.

10. The court erred in not holding that if petitioners were entitled to interest in excess of that allowed by respondent, they were only entitled to interest on $12,815.81 from September 15, 1920, and on $22,239.23 from December 15, 1920, to August 12, 1924.

PEYTON GORDON,
United States Attorney.
VERNON E. WEST,
Assistant United States Attorney.
Attorneys for Respondent.

In Supreme Court of District of Columbia

Praecipe for transcript of record. Filed February 4, 1925

* * * * * * *

The clerk will please prepare a transcript of the record in the above-entitled cause, on appeal to the Court of Appeals of the District of Columbia, and include therein the following:

1. Petition.
2. Rule to show cause.
3. Answer of respondent.
4. Amendment to answer and exhibits filed October 20, 1924.
5. Demurrer.
6. Amendment to answer filed October 31, 1924.
7. Memorandum opinion of the court.
8. Order sustaining demurrer to answer and amendments.
9. Judgment.
10. Note of appeal.
11. Assignments of error.
12. This designation.

PEYTON GORDON,
United States Attorney,
Attorney for Respondent.

Service of copy of above designation acknowledged this 30 day of January, 1925.

JAMES CRAIG PEACOCK,
Attorney for Petitioner.

15 [Clerk's certificate to foregoing transcript omitted in printing.]

16 [Minute entry of argument and submission May 5, 1925 omitted in printing.]

17 In Court of Appeals of the District of Columbia

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, appellant
vs.
UNITED STATES EX REL. G. THOMAS BIRKENSTOCK AND Gerald Ronon, Executors of the last will of Margaret Murphy, deceased } No. 4296

OPINION

Before Martin, Chief Justice; Robb and Van Orsdel, Associate Justices.

Mr. Chief Justice Martin delivered the opinion of the court:

Appeal from the Supreme Court of the District of Columbia.

This is an appeal from a judgment of the lower court awarding to appellees, who were petitioners below, a writ of mandamus directing the appellant as Commissioner of Internal Revenue to allow interest upon a certain refund of income taxes in excess of that already allowed by him.

Section 1324 (a) of the revenue act of 1921 provided inter alia that upon the allowance of a claim for the refund of income taxes paid interest should be allowed and paid upon the total amount of the refund at the rate of one-half of 1 per centum per month to the date of the allowance. If such taxes were paid under a specific protest setting forth in detail the basis of and reasons for the protest, the interest should run from the time when the taxes were paid; but if no protest was made interest should not begin to run until six months after the filing of a claim for the refund.

Article 1940 of Regulations 62, duly promulgated by the commissioner under this act, provided that a claim for refund is "allowed" within the meaning of the foregoing provision when "the commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund."

18 Section 1324 (a), supra, was specifically repealed by the terms of section 1100 (a) of the revenue act of 1924, approved June 2, 1924. Section 1019 of the latter act, however, provides that upon the allowance of such refunds interest shall be allowed and paid on the amount thereof at the rate of 6 per centum per annum from the date when the taxes were paid to the date of the allowance of the refund. This section applies alike to all such refunds without regard to protest.

Article 1371 of Regulations 65, duly promulgated under this act, readopts the provision that a claim for refund is "allowed" within the meaning of the statute "when the commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund."

It thus appears that under the revenue act of 1921 a refund of income taxes paid without protest would bear interest only from six months after the filing of the claim for refund, whereas under the revenue act of 1924 such a refund, notwithstanding the absence of a protest, would bear interest from the date when the taxes were paid. Under each act the interest would run until the time of the "allowance" of the refund. The income taxes for which the present refund was allowed were paid in the year 1920, without protest; and the question is whether interest should be computed upon it according to the act of 1921 or that of 1924.

The facts in the case are admitted by the pleadings. In the year 1920 the decedent, Margaret Murphy, paid to the collector of internal revenue at Philadelphia the sum of $88,956.92 as her income taxes for the year 1919, payment being made in equal quarterly installments of $22,239.23 each, on April 15, June 16, September 15, and December 15, 1920. Afterwards, on May 18, 1923, she filed a claim with the commissioner alleging that the assessment was excessive and claiming a refund. This claim was duly examined, and on May 19, 1924, the deputy commissioner reported an overpay-
19 ment in the sum of $35,054.85 and recommended the allowance of a "reduction in tax liability" in that amount. On the same day the commissioner issued an "authorization" to the collector at Philadelphia, notifying him that the amount aforesaid was approved and allowed as a "reduction of tax liability," and directing him to check the item against the accounts of the taxpayer and determine whether the amount of the reduction should be abated in whole or in part, and to make any abatement warranted by the condition of said accounts for the years involved, also to examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against any taxes due from her, and to report and certify to the commissioner the net amount refundable to her. This "authorization" was duly received by the collector at Philadelphia, and on June 30, 1924, he reported that he had checked the item in question against the accounts of the taxpayer and found the sum of $35,054.85 to be the "net amount refundable" in accordance with said reduction. Afterwards, on August 12, 1924, the commissioner forwarded an "authorization" to the disbursing clerk, directing him to pay to the claimant the sum of $35,054.85, together with interest in the sum of $1,057.41. The interest was computed under the terms of the revenue act of 1921, and accordingly ran from November 18, 1923, which was six months after the filing of the claim for refund. On August 25, 1924, a check for the aggregate sum thus authorized was delivered to the appellees as executors of the estate of the claimant, and subsequently was cashed by them. At the same time, however, they protested to the collector against the amount of interest thus allowed and demanded that it be computed under the revenue act of 1924, to wit, from the dates of the quarterly

payments made by the decedent in the year 1920. When this demand was rejected the present proceeding in mandamus was begun to compel the commissioner to authorize and require the payment of additional interest under the provisions of the latter act. The lower court sustained this claim and entered judgment accordingly.

20 We agree with the judgment of the lower court. The record discloses that no finding or order respecting the payment of interest upon the refund was made or could have been made by the commissioner until June 30, 1924, at which time the collector at Philadelphia reported the result of his examination. But before that time Congress repealed section 1324 (a) of the revenue act of 1921, consequently the commissioner was no longer authorized to proceed under it. After the repeal his sole authority to order the disbursing clerk to pay interest upon such refunds was derived from section 1019 of the revenue act of 1924. Consequently the provisions of that section were controlling, and the interest upon this refund should have been computed accordingly.

This conclusion is not inconsistent with the statutory provision that interest upon such refunds shall run until the date of their "allowance," nor does it tend to invalidate the department's regulation that the term "allowance," when used to indicate the close of the interest period, shall signify the date "when the commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund." In the present instance, however, the repeal of the former act, and the enactment of the latter, before the refund in question was paid or ordered to be paid, necessarily required that the allowance and payment should be made under the latter act.

It is our opinion, furthermore, that the acceptance by the appellees of the check issued to them by the disbursing clerk does not under the circumstances bar them from maintaining their present action. We think also that the lower court was right in requiring that the increased interest should be computed equally upon the quarterly overpayments as of the dates when the respective installments of taxes were paid. The interest, however, should be computed only to August 12, 1924, that being the date when the commissioner ordered the disbursing clerk to make payment of the refund.

21 No question of fact is involved in this case, nor is the appellant required to exercise any discretion when allowing interest upon such refunds. The duty is ministerial only, and is mandatory. Upon the facts in the case the appellees have no other adequate remedy. They are therefore entitled to a writ of mandamus. Roberts vs. Valentine, 176 U. S. 221; Lane vs. Hoglund, 244 U. S. 174; Work vs. McAlester-Edwards Co., 262 U. S. 200.

Subject therefore to the modification that interest shall be computed only to August 12, 1924, the judgment of the lower court is affirmed with costs.

LOSE IN CENTER

22 In Court of Appeals of District of Columbia

[Title omitted.]

Judgment, June 1, 1925

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, modified so as to read that the interest should be computed only to August 12, 1924, and as so modified, affirmed with costs.

Per Mr. Chief Justice MARTIN.

23 In Court of Appeals of the District of Columbia

[Title omitted.]

Motion to stay mandate filed June 18, 1925

Now comes the appellant, David H. Blair, Commissioner of Internal Revenue, and moves the court to stay the mandate in the above-entitled cause for a reasonable time, in order that he may petition the Supreme Court of the United States for a writ of certiorari.

PEYTON GORDON,
United States Attorney, Attorney for Appellant.

Copy of above motion mailed this eighteenth day of June, 1925, to James Craig Peacock, Esquire, Albee Building, Washington, D. C., attorney for appellees.

PEYTON GORDON,
United States Attorney, Attorney for Appellant.

24 [File endorsement omitted.]

25 In Court of Appeals of District of Columbia

[Title omitted.]

Order allowing motion to stay mandate. June 24, 1925

On consideration of the motion to stay the mandate in the above-entitled cause a reasonable time that appellant may apply to the Supreme Court for a writ of certiorari,

It is ordered by the court that said motion be, and the same is hereby, granted.

* * * * * * *

26 [Clerk's certificate to foregoing transcript omitted in printing.]

27 In Supreme Court of the United States

Order allowing certiorari. Filed October 26, 1925

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

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Questions presented:	
I. Does mandamus lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of section 1324 (a) of the revenue act of 1921	1
II. What is the date of the "allowance of a claim for the refund of or credit for internal-revenue taxes paid" within the meaning of section 1324 (a) of the revenue act of 1921	2
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AUTHORITIES CITED

Cases:	
Angarica v. *Bayard*, 127 U. S. 251	4, 14
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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. ——

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

UNITED STATES EX RELATIONE G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of David H. Blair, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above case on June 1, 1925, affirming the judgment of the Supreme Court of the District of Columbia.

QUESTIONS PRESENTED

I

Does mandamus lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of section 1324 (a) of the Revenue Act of 1921?

II

What is the date of the "allowance of a claim for the refund of or credit for internal revenue taxes paid" within the meaning of section 1324 (a) of the Revenue Act of 1921?

STATEMENT

This case arose out of the allowance by the Commissioner of Internal Revenue of respondents' claim for a refund of $35,054.85 overpaid income taxes for the year 1919.

The Government contends that the date of the allowance of this refund was May 19, 1924, the date on which the Commissioner signed a schedule of overassessments and allowance of abatements, credits, and refunds, and that therefore interest was payable only up to that date computed from November 18, 1923 (six months after the filing of claim for refund), in accordance with the provisions of Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 227, ch. 136); whereas respondents contend that the refund was not allowed until August 12, 1924, the date on which the Commissioner signed an authorization to the Disbursing Clerk of the Treasury Department directing payment of the refund and that interest thereon was payable up to that date computed from the date the tax erroneously collected was paid, in accordance with Section 1019 of the Revenue Act of 1924 (43 Stat. 253, ch. 234).

Upon petition for a writ of mandamus the Supreme Court of the District of Columbia sustained the contention of the respondents, which judgment was affirmed by the Court of Appeals of the District of Columbia.

For the language of the statutes involved and a more detailed statement of the facts, reference is made to the supporting brief included herein.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals has misconstrued the meaning of the word "allowance" as used in Section 1324 (a) of the Revenue Act of 1921.

2. The court's construction of the word "allowance" overrules the settled practice of the Treasury Department, not only with respect to the allowance of *claims* for refunds duly filed by taxpayers but also in the matter of the application of the period of limitation for the *voluntary* refund of erroneously collected taxes fixed by Section 252 of the Revenue Acts of 1918 (40 Stat. 1057, ch. 18) and 1921 (42 Stat. 227, ch. 136) and Section 281 of the Revenue Act of 1924 (43 Stat. 253, ch. 234).

3. The case is one of great public importance and of great importance to the Government in the administration of the revenue laws, for the reason that it affects every refund made by the Treasury Department of internal-revenue taxes.

4. The decision of the Court of Appeals is not in harmony with the rulings of this Court with

respect to the allowance of interest against the Government. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251; *United States* v. *New York*, 160 U. S. 598.

5. Under the decision of the Court of Appeals thousands of interest payments on claims for refund will have to be adjusted, involving the payment of approximately $6,000,000. In addition, it will be necessary to pay out of the Treasury an indefinite amount to cover claims which may be filed in the future.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

AUGUST, 1925.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinions of the courts below have not yet been reported. However, the opinion of the Supreme Court of the District of Columbia will be found on page 12 of the transcript of record and the opinion of the Court of Appeals of the District of Columbia on page 16 thereof.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered on June 1, 1925. **(R. 19.)**

No question of jurisdiction was raised in the courts below.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, ch. 229).

STATEMENT OF FACTS

In the year 1920 one Margaret Murphy, subsequently deceased, paid, without protest, to the Collector of Internal Revenue at Philadelphia the sum of $88,956.92 as her income tax for the year 1919. (R. 1, 2.) Later, on May 18, 1923, a claim was filed with the Commissioner of Internal Revenue for a refund of $35,054.85, alleged to be an overpayment of taxes for 1919. (R. 7.) This claim was duly examined, and on May 19, 1924, the Commissioner of Internal Revenue, in accordance with the provisions of Section 1324 (a) of the Revenue Act of 1921, signed a schedule of overassessment and allowance of abatement, credit and refund in the amount claimed by respondents, and gave certain instructions to the Collector of Internal Revenue for the First District of Pennsylvania with respect thereto. (R. 8.) The Collector relisted the amount of the refund on a subsidiary schedule known as a schedule of refunds and credits, with the statement, signed June 30, 1924, that—

> The items hereon are relisted as they appeared for refund or credit on an original schedule of overassessments and related

> claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit. (R. 8., Exhibit A, at p. 10 of Record.)

On August 12, 1924, the Commissioner signed an authorization to the Disbursing Clerk of the Treasury Department directing him to pay a refund to respondents in the sum of $35,054.85, together with interest amounting to $1,057.41, with the instruction that interest was to be computed from November 18, 1923 (six months after the filing of the claim for refund), to May 19, 1924, the date on which the Commissioner made the allowance aforesaid. (R. 8, Exhibit A.) On August 25, 1924, a check for the amount of the refund plus interest computed in accordance with the Commissioner's instructions was mailed to respondents and subsequently cashed. Respondents, however, protested the amount of interest allowed and demanded that it be computed from the dates of the respective quarterly payments made by the decedent in 1920 to August 12, 1924, the date upon which the Commissioner signed the authorization to the Disbursing Clerk for payment. (R. 2, 8.)

Upon the refusal of the Commissioner of Internal Revenue to accede to the demand for addi-

tional interest, the respondents petitioned the Supreme Court of the District of Columbia for a writ of mandamus to compel the Commissioner to compute and allow interest on the amount of the refund at 6 per cent per annum from the respective dates of the quarterly instalments to August 12, 1924, and to authorize and direct the proper disbursing officer to pay to the respondents the amount by which the sum of such interest exceeded $1,057.41, the amount of interest theretofore received. Petitioner filed an answer, to which respondents demurred. On January 2, 1925, the Supreme Court of the District of Columbia sustained this demurrer (R. 12), and upon appeal (R. 13) the Court of Appeals of the District of Columbia, on June 1, 1925, sustained the judgment of the Supreme Court of the District of Columbia (R. 19), modifying the same to the extent that interest should be computed only to August 12, 1924, and holding that the Act of 1924 applied instead of the Act of 1921.

STATUTES INVOLVED

Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 227, ch. 136) provides:

> That upon the allowance of a claim for the refund of or credit for internal-revenue taxes paid interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such alowance, as follows: (1) If such amount was paid under

> a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

This section of the Revenue Act of 1921 was specifically repealed by Section 1100 (a) of the Revenue Act approved June 2, 1924 (43 Stat. 253, ch. 234). The latter Act, in Section 1019, with respect to the same subject matter, provides:

> Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the

assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

SPECIFICATION OF ERRORS TO BE URGED

The errors which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the decision of the Court of Appeals of the District of Columbia are:

1. The court erred in holding that mandamus lies to compel the Commissioner of Internal Revenue to compute additional interest under the provisions of Section 1324 (a) of the Revenue Act of 1921, relating to the allowance of interest on a refund of taxes erroneously collected.

2. The court erred in failing to hold that the construction placed upon Section 1324 (a) of the Revenue Act of 1921 by petitioner was a reasonable one and within the discretion reposed in him by law.

3. The court erred in holding that respondents are entitled to interest from the dates of the payments of the quarterly instalments of the decedent's 1919 tax.

4. The court erred in failing to hold that the approval by petitioner on May 19, 1924, of the schedule of assessments and allowance of abatements, credits, and refunds was the allowance of respondents' claim for refund within the meaning of Section 1324 (a) of the Revenue Act of 1921.

ARGUMENT

I

The action of the Commissioner of Internal Revenue in allowing interest on claims for refund is in the exercise of his judgment and discretion, and is not reviewable by the courts in a mandamus proceeding

The rules respecting the extent to which the action of an executive officer will be controlled by a writ of mandamus are well settled. The rule is that if the question is one necessitating the construction of statutes in order for the officer to decide the course of action to be pursued, judgment and discretion are involved and the courts will refuse to interfere by mandamus. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *United States ex rel. Hall* v. *Payne*, 254 U. S. 343.

Such is the case here. Section 1324 (a) of the Revenue Act of 1921, *supra*, provides that interest shall be allowed upon the total amount of an allowance by the Commissioner of Internal Revenue of a claim for refund or credit to the date of such allowance. When this provision is read, as it must be, in connection with the various steps necessarily involved in the departmental procedure relating to the refunding of taxes erroneously collected, it is obvious that the statute required construction by the Commissioner before it could be administered. As stated in *United States ex rel. Hall* v. *Payne*, *supra* (p. 347):

> It is manifest from this statement that the petition presents a controversy over the true construction of the Act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. * * * He could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

The cases of *Roberts* v. *United States,* 176 U. S. 221; *Lane* v. *Hoglund,* 244 U. S. 174; and *Work* v. *McAlester, Etc., Co.,* 262 U. S. 200, relied upon by the Court of Appeals, are not in point. They each involved statutes the construction of which was hardly open to debate. The Court was very careful to emphasize this fact. Thus, in the *Hoglund* case the Court said, speaking of the statute (p. 181):

> We think it *certainly* and *unmistakably* lays upon the Secretary of the Interior * * * a *plain* duty. * * * [Italics ours.]

Here the case is quite different. The statute involved clearly required construction before it could be given operation.

A further reason why the court below should have dismissed the petition for a writ of mandamus is that under the principle of *Crozier* v. *Krupp*, 224 U. S. 290, it would seem that petitioners have an adequate remedy by suit in the Court of Claims.

II

Within the meaning of section 1324 (a) the commissioner allowed the claim for refund on May 19, 1924

Petitioner's case might well rest here, but, conceding for the sake of argument that mandamus does lie, still respondents should not prevail.

Section 1324 (a) provides:

> That upon the allowance of a claim for the refund of or credit for internal-revenue tax paid interest shall be allowed * * * and paid upon the total amount of such refund or credit to the date of *such allowance.* * * * [Italics ours.]

As here used, the term "such allowance" manifestly can only have reference to the date upon which the Commissioner, after due examination, formally decides that the claimant is entitled to a refund or credit. Such is the sense in which the word "allow" is commonly understood. Thus, in *Marshall* v. *Franklin Fire Insurance Company of Philadelphia*, 176 Pa. State 628, following the definition of well-recognized dictionaries, the Supreme Court of Pennsylvania says (p. 636):

> This word is ordinarily equivalent to the word "permit" or to the words "consent

> to." Its use in any given case assumes the existence of a power to refuse to allow, permit, or consent to and the right to elect whether to grant or withhold the allowance or permission asked for.

So, in the instant case, the Commissioner "allowed" the claim for refund on May 19, 1924, by indicating his approval thereof by signing on that date the schedule which read:

> The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto. (Exhibit A of Record.)

Consequently, all subsequent actions by the Commissioner, such for instance as receiving a report from the Collector or signing a later schedule, amount and can amount to nothing more than subsequent steps in the procedure essential to procuring payment by a different bureau of the Government. The fact that claimant is entitled to a refund or credit, and the amount thereof, is determined and fixed when the Commissioner signs the first schedule. Thereafter it is only a routine matter to determine how much the claimant shall receive in cash and how much by way of credit. Whether the allowance is liquidated in whole by credit or in whole by cash or partly by credit and

partly by cash, the total of principal and interest received by claimant is the same, and the date of allowance remains the date of the approval of the original schedule. To compute interest after that date would be to pay interest *beyond* instead of "*to* the date of such allowance." This practice, which has always been followed, is in exact conformity with the language of the law and is within the rule established by numerous decisions of this Court that interest is not to be allowed against the Government except where there is an express agreement to pay or clear statutory authority therefor. *United States* v. *Sherman*, 98 U. S. 567; *Angarica* v. *Bayard*, 127 U. S. 260; *United States* v. *New York*, 160 U. S. 619.

CONCLUSION

In view of the fact that the question here involved is of great importance in the practical administration of the revenue laws, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General.

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Attorney.

AUGUST, 1925.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 713

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

UNITED STATES EX RELATIONE G. THOMAS BIRKENSTOCK and Gerald Ronon, executors of the last will of Margaret Murphy, deceased

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER IN OPPOSITION TO MOTION TO AFFIRM

OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 16) is reported in 6 F. (2d) 679. The opinion of the Supreme Court of the District (R. 12) is not reported. Both opinions are printed in the appendix to respondent's brief.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia to be reviewed was entered June 1, 1925. (R. 19.) The petition for certiorari was

filed August 27, 1925, and allowed October 26, 1925, under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936.

THE QUESTION

The substantial question left in the case is whether, in the calculation of interest payable to the taxpayer on refunds allowed pursuant to the Revenue Act of 1924 on account of an excessive tax paid in quarterly installments, interest on the amount refunded should be computed on the amounts by which each quarterly payment exceeded one-fourth of the correct tax, from the dates of the respective quarterly payments, or whether the dates from which interest is computed should be the dates on which payments in excess of the full amount of the correct tax were made.

STATEMENT

During 1920 the respondents' testatrix, Margaret Murphy, paid to the Collector of Internal Revenue at Philadelphia, the sum of $88,956.92, as her income tax for the year 1919, in four equal quarterly installments of $22,239.23, on April 13, June 10, September 27, and December 13, respectively. (R. 4.) On May 18, 1923, a claim for refund of $35,054.85 was filed, and thereafter allowed, the schedule of overassessment being signed by the Commissioner and transmitted to the collector on May 19, 1924. After receiving the

collector's report, and on August 12, 1924, the Commissioner authorized the disbursing clerk to pay the respondents $35,054.85 and interest thereon, amounting to $1,057.41. The statutes provided for interest on a refund to the date of its "allowance." At that time (prior to the decision of the Court in No. 137, *Girard Trust Company et al.* v. *United States*, decided March 1, 1926) the Commissioner considered the date of allowance of the refund, and therefore the date to which interest thereon should be computed, to be the date on which the schedule of overassessment was signed and transmitted to the collector, which in this case was May 19, 1924, and the interest which he allowed the taxpayer was computed *to* May 19, 1924.

As that date of allowance was prior to the passage of the Revenue Act of 1924, the Revenue Act of 1921 was treated as determining the right to interest, and under it, there having been no specific protest when the tax was paid, interest was computed *from* a date six months after the claim for refund was filed, as provided in Section 1324(a) of the Revenue Act of 1921. (Chap. 136, 42 Stat. 227, 316.) That date was November 18, 1923. The interest actually paid, with the refund, was therefore interest at the rate of 6% per annum on $35,054.85 from November 18, 1923, to May 19, 1924.

The *Girard Trust Company case* has settled the point that the date of allowance was August 12, 1924, and that interest should have been computed

to that date. August 12, 1924, being the date of allowance, and the Revenue Act of 1924 having been passed June 2, 1924 (Chap. 234, 43 Stat. 253), and being applicable to allowances of refunds made after its passage, the latter Act and not the Revenue Act of 1921 fixes the date *from* which interest must be computed.

The Revenue Act of 1924 omitted the provision of the prior Act for computation of interest, in the absence of specific protest, from a date six months after the filing of the claim for refund, and made the date from which interest was to be computed in every case the date on which the amount erroneously or illegally collected was paid.

Section 1019 of the Revenue Act of 1924 (Chap. 234, 43 Stat. 253, 346) is as follows:

> Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term " additional

> assessment " as used in this section means a further assessment for a tax of the same character previously paid in part.

The question then is what was the date of payment of the tax illegally collected in this case. Was there an illegal collection of a part of each quarterly installment, or was there no payment of an illegally collected tax until after the installments paid had discharged the full amount of the correct tax owing to the Government?

SUMMARY OF ARGUMENT

I. The decision in *Girard Trust Company* v. *United States* (March 1, 1926) disposed of the question here presented as to the date of allowance of the refund, and consequently the date to which interest on a refund should be computed, but did not touch the other question in this case as to the date from which the interest should be computed.

The date of allowance being thus determined to be August 12, 1924, subsequent to the enactment of the Revenue Act of June 2, 1924, the latter Act applies and fixes the date from which interest on the refund is to be computed. The 1924 Act allows interest from the date of payment of a tax erroneously or illegally collected. There was no illegal or erroneous collection of any amount prior to the date when the taxpayer paid the full amount justly owing to the United States.

Where an excessive tax was paid in quarterly installments, there was no illegal collection as long as the aggregate amount paid did not exceed the total amount of the correct tax.

The statutes contemplated that if a quarterly installment paid exceeded one-fourth of the correct tax, the excess, without an allowance for interest thereon, should be applied on the balance owing.

The view opposed to that contended for by the Commissioner would result in allowing interest on a refund from a date prior to that on which any refundable excess was paid and from a date before that on which the right to a refund arose.

II. The point that mandamus will not lie is waived by the United States in order to obtain a decision on the merits. The point above discussed was clearly made by assignment of error in the brief supporting the petition for certiorari, if not in the petition itself, and any defect in the specification of errors in the petition should be disregarded.

ARGUMENT

I

THERE WAS NO TAX ILLEGALLY COLLECTED BEFORE THE AMOUNT OF THE CORRECT TAX HAD BEEN PAID

The *Girard Trust Company* case settles the point that the date of "allowance" of the refund in this case was August 12, 1924, and not May 19, 1924, as the Commissioner has contended. The

date to which interest should have been computed was August 12, 1924, and in that respect the decision below must stand. The *Girard Trust Company* case does not touch the question as to the date from which the interest computation should be made.

Section 1019 of the Revenue Act of 1924 provides that:

> Upon the allowance of a * * * refund of any * * * tax erroneously or illegally assessed or collected, * * * interest shall be allowed * * * on the amount of such * * * refund from the date such tax * * * was paid, etc.

The words "such tax" refer to the tax "erroneously or illegally assessed or collected." In the present case, the total tax paid was $88,956.92. The correct amount actually owed was $53,902.07. The excess erroneously collected, and afterwards refunded, was $35,054.85. The respondents contend that each of the quarterly installments paid by the taxpayer should have been $13,475.51 instead of $22,239.23, and that of each installment paid, $8,763.72, was "illegally collected," and therefore the interest on the refund should have been computed from April 13, 1920, on $8,763.72 thereof, from June 10 on $8,763.72 thereof, from September 27 on $8,763.72 thereof, and from December 13 on a like amount.

The Commissioner contends, on the other hand, that no amount was erroneously or illegally col-

lected, so long as the amount paid had not exceeded the true amount owing and payable, and since the correct tax in this case was $53,902.07, the amount of the two installments of $22,239.23 each, paid, respectively, April 13 and June 10, 1920, being in the aggregate less than the correct tax, was not erroneously or illegally collected, and when voluntarily paid the Government had a right to keep them, and it was not till the third installment was paid on September 27 that more than the true amount payable was collected. The third installment satisfied the true balance of $9,423.61 then owing, and to the extent of $12,815.62 represented a payment beyond the amount of the correct tax, and for the first time resulted in an illegal or erroneous collection by the United States. Interest should therefore be computed on $12,815.62 from September 27, 1920, and on $22,239.23 from December 13, 1920.

The Commissioner's position is fortified by the provisions of Section 250 of the Revenue Act of 1918 (Chap. 18, 40 Stat. 1057, 1082), under which this tax was paid. Subdivision (a) of that section provides:

> That * * * the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. * * *
>
> The tax may at the option of the taxpayer be paid in a single payment instead of in installments, etc.

Subdivision (b) of Section 250 of the 1918 Act provides (p. 1083):

> As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, *the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.* (Italics ours.)

Section 252 of the 1918 Act provides (p. 1085):

> That if, upon examination of any return of income made pursuant to this Act, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer.

Similar provisions are found in the 1924 Act.

The excerpts from the statutes clearly show that if a quarterly installment paid is more than one-

fourth of the true tax, the excess is to be credited on the balance owing, and the taxpayer receives no interest on the excess so applied. It can not be said that an illegal collection was made prior to September 27th, entitling the taxpayer to interest when, under these statutes, the United States had the right to retain the amounts paid prior to September 27th and apply them on the balance owing to it.

The installment feature was optional with the taxpayer. The United States should not be required to pay interest on amounts owing to it and presently payable, because paid at the option of the taxpayer before the date when penalties would have attached, unless expressly provided by statute.

A taxpayer who paid the entire tax in one installment was not entitled to interest by the 1918 Act for having anticipated the dates on which he was required to pay, by waiving the privilege of paying in installments.

If this taxpayer after paying two installments of the excessive tax had then discovered his mistake and had limited the third installment to the balance actually owing, he would have paid in advance of the dates on which he was required to pay, but he would obviously not have been entitled to be paid by the United States any interest on the amounts by which the installments paid exceeded one-fourth of the correct tax. There would, in that case, have been no refund. The present case is not different

in principle. The tax in this case was voluntarily paid, and no amount was paid in excess of the correct tax until September 27th, and how can it be said a voluntary payment of no more than was owing resulted in an illegal or erroneous collection? There was no refundable excess paid until September 27th, and there must be a fallacy in the contention that interest on a refund must be computed from a date prior to that on which any refundable amount was paid by the taxpayer, and from a date prior to the date when the right to a refund arose.

II

THE POINT RESPECTING THE DATE FROM WHICH INTEREST IS COMPUTED IS PRESENTED BY THE PETITION AND BRIEF FOR CERTIORARI

The brief for the respondents in support of the motion to dismiss or affirm states that only two questions were raised by the petition for certiorari, and they were: First, whether mandamus will lie against the Commissioner, and, second, whether the date of allowance, to which interest is to be computed, was correctly determined.

The suggestion is that the petition for certiorari does not specify as an error the decision of the Court of Appeals on the question as to the date *from* which interest should be computed.

The petition for certiorari is loosely drawn, and in it the question discussed in paragraph I of this brief is not pointed out. It must be admitted that a well-drawn petition for certiorari should specify

all the errors to be urged. In this case, however, attached to the petition, under the same cover, the brief in support, under the head of "Specification of Errors to be Urged," contains the following (page 9):

> 3. The court erred in holding that respondents are entitled to interest from the dates of the payments of the quarterly instalments of the decedent's 1919 tax.

The alleged error was clearly specified there.

The point was also made in the Court of Appeals of the District, by assignment of error (R. 14), which is the same as that in the brief in support of the petition for certiorari.

The Court may, under Rule 25, paragraph 4, consider an error unassigned. It also has the power to allow amendments to the assignments of error.

The question here presented is important. The Treasury Department has consistently adhered to the construction of the 1924 Act here urged respecting the date from which interest on refunds is to be computed, when the tax was paid in installments. Other pending cases, involving in the aggregate very considerable sums, will turn on the question. If this attempt to present the point is defeated because of the fact that the specification of error was in the supporting brief instead of in the petition for certiorari, it will be necessary to bring another test case to this Court.

The Court should treat the specification of error in the brief as part of the petition (*Hubbard* v. *Tod*,

171 U. S. 474, 494) or consider the petition amended to include it, or exercise its power to consider an unassigned error, and decide the case on the merits.

There is much that could be said in support of the point that mandamus will not lie. That point is waived, and the assignment of error based on it is withdrawn. Since this case is here, the interests of taxpayers as well as of the United States will be better served by a decision on the merits, settling the proper course to be followed in other cases by the Bureau of Internal Revenue than by urging a point of procedure which, if sustained, would mean further litigation, expense, and delay. It is hoped therefore that the Court may see its way clear to decide the case on the merits.

Respectfully submitted.

WILLIAM D. MITCHELL,
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RALPH E. SMITH,
Special Attorney.

APRIL, 1926

○

POSTPONED TO MERITS
APR 19 1926

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1925.

No. 713.

DAVID H. BLAIR,
COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

vs.

UNITED STATES, EX REL. G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED,
Respondents.

MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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Respondents.

MOTION TO AFFIRM.

Now come the respondents, by their counsel, and move that the judgment of the Court of Appeals of the District of Columbia be affirmed for the reason that since the granting of the petition for certiorari in this case on October 26, 1925, all the questions raised in the petition as "Reasons for granting the petition" have been settled and concluded by the decision handed down by this Court on March 1, 1926, in *Girard Trust Company, et al, vs. United States,* October Term, 1925, No. 137.

Respectfully submitted,

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

BRIEF IN SUPPORT OF MOTION.

Opinions of the Courts Below

The opinion of the Court of Appeals of the District of Columbia is now reported at 6 F. (2d) 679. The opinion of the Supreme Court of the District of Columbia is not reported.

Jurisdiction.

This case is pending in this Court by virtue of writ of certiorari granted October 26, 1925, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936).

Statement.

During 1920 Margaret Murphy made a return of and paid to the Collector of Internal Revenue for the First District of Pennsylvania $88,956.92 as income tax for 1919, for which a claim for refund was subsequently filed. On May 19, 1924, the Commissioner of Internal Revenue signed a schedule form which showed an overassessment of $35,054.85 in her 1919 tax. This was transmitted to the said Collector with instructions to examine the taxpayer's account and to report back what portion, if any, of the $35,054.85 should be refunded. The Collector made his report on June 30, 1924. The Deputy Commissioner of Internal Revenue confirmed the report on August 12, 1924, and on the same day the Commissioner for the first time directed

the refund and signed the authorization to the disbursing clerk to pay it (Exhibits A and B*).

The principal question raised in this case was *whether May 19, 1924, or August 12, 1924,* was *the* date of the allowance *of the refund.* The lower court held that August 12, 1924, was "the date of the allowance of the refund" within the meaning of Section 1019 of the Revenue Act of 1924 (43 Stat. 253, 346), and that interest on the refund should be allowed to that date and as provided in that section. The Court of Appeals affirmed that decision.

Argument.

1. The petition for writ of certiorari which has been allowed by this Court raises only one substantial question, viz., what was the date of allowance of the refund?

It is true that on the first page of the petition two questions are in the following terms stated as being presented:—

"I.

Does mandamas lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of section 1324 (a) of the Revenue Act of 1921?

---

*Note. The petitioner has not yet provided for the printing of the record in this case, although the writ of certiorari was allowed October 26, 1925. The respondents have therefore printed and attached as an appendix to this brief such portions of the record as are necessary for consideration of their motion, viz., Exhibits A and B of Commissioner's answer in the Supreme Court of the District of Columbia, and the opinions of that court and of the Court of Appeals.

II.

What is the date of the 'allowance of a claim for the refund of or credit for internal revenue taxes paid' within the meaning of section 1324 (a) of the Revenue Act of 1921?"

But that is also the last and only reference *in the petition* to the first of these questions, and in the "Reasons for Granting the Petition" on pages 3 and 4 the petitioner made no further reference to this question and suggests no reasons why the petition should be granted on any ground other than those relating to the second question.

It is submitted therefore that there was no proper basis for any argument that appeared on this point in the brief "in support of" the petition, and that this aspect of the case may well be considered as disposed of by the Court of Appeals and on the authority of the decisions cited in its opinion.

That court held—

> "No question of fact is involved in this case, nor is the appellant required to exercise any discretion when allowing interest upon such refunds. The duty is ministerial only, and is mandatory. Upon the facts in the case, the appellees have no other adequate remedy. They are therefore entitled to a writ of mandamus. *Roberts v. Valentine*, 176 U. S. 221, *Lane v. Hoglund*, 244 U. S. 174, *Work v. McAlester-Edwards Co.*, 252 U. S. 200."

Every one of the five reasons alleged in the petition related to the question of what was the date of allowance, to consideration of which question we now turn.

2. The question as to what was the date of allowance is controlled by the decision since handed down by this Court in the Girard Trust Company case, and the decision of the lower court should be affirmed on its authority.

On refunds allowed between November 23, 1921, and June 1, 1924, inclusive, interest was provided for in Section 1324 (a) of the Revenue Act of 1921 (41 Stat. 227, 316):

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

while on refunds allowed on and after June 2, 1924, interest was directed to be paid in accordance with the more liberal provisions of Section 1019 of the Revenue Act of 1924 (43 Stat. 253, 346) which was enacted on that date:

> "Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally

> assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

But that the procedure under the two acts was *identically* the same is apparent on examination of Exhibits A and B (copies of which are appended to this brief.) It can be seen at a glance that the first two certificates on the first schedule (Exhibit A) were signed prior to June 2, 1924, while Sec. 1324 (a) of the Revenue Act of 1921 was still in effect, whereas the last certificate on that schedule and all three certificates on the second schedule (Exhibit B) were signed after June 2, 1924, when Sec. 1019 of the Revenue Act of 1924 took effect. It is apparent therefore that the new statutory provision neither made nor required any change in the departmental procedure or course of business.

In *Girard Trust Company et al. vs. United States*, October Term, 1925, No. 137, decided March 1, 1926, exactly the same question as to the date of allowance of a refund was passed on by this Court. The refund in that case was allowed in 1923 instead of in 1924 as in this case, and hence the interest was payable

under Sec. 1324 (a) of the Revenue Act of 1921, but the case was presented to this Court on a record which included as exhibits the schedules which corresponded to and were substantially the same as the present Exhibits A and B. This Court in its opinion described the course of business as shown by those exhibits and held that the refund was not allowed until January 16, 1923, when the Commissioner signed the authorization of payment of the refund on the second schedule. This court said:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the Collector of Internal Revenue, who made the collection and keeps the account with the taxpayer. The findings and the exhibits show that the course of business is that the Collector on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the Bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval. Until it reaches him and is approved by him, the refund can not be paid. This we think is the real date of allowance. Until that time, the exact amount of the refund is not fixed finally by competent authority. This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money

> unjustly taken and kept by the Government. We think, therefore, that the trustees are entitled to recover from the Government, interest on both the refund for the taxes of 1917 and that for those of 1920 from December 9, 1922 to January 16, 1923."

In the present case the Commissioner approved the refund by signing on August 12, 1924, the authorization for its payment. The decision of the court below that this was the date of allowance is therefore no longer open to question and should be affirmed on the controlling authority of the *Girard Trust Company case.*

3. There being no other questions raised by the petition for certiorari, the judgment of the court below which is in accordance with the subsequent decision of this Court should be affirmed.

Respectfully submitted,

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

"Exhibit A"

2425

TREASURY DEPARTMENT
U.S. INTERNAL REVENUE SERVICE
Form 7805
Form approved by Comptroller General
Feb. 5, 1935

IMMEDIATE

This schedule must be executed and all required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

SCHEDULE OF OVERASSESSMENTS
AND
ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office

Schedule No. IT-A- 10274

Sheet 1 of 2 sheets

FIRST District of PENNSYLVANIA

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The overassessments or reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date

Deputy Commissioner

AUTHORIZATION OF COMMISSIONER

To the Collector FIRST *District of* PENNSYLVANIA

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the certification of Overassessment" or "Notice of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be restored wholly or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (The section only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date 19

Commissioner of Internal Revenue

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated hereon.

Date June 30, 1924

1st. District of Pa.

ACCOUNTS UNIT
Items not entered

Item No.	Certificate of Overassessment or Claim Number	Name and Address of Taxpayer	Overassessments or Reductions of Tax Liability (Amount)	Ledger, Page and Line, or Account Number	Tax Liability Year	Abatement (Amount)	Overpayment (Amount)	Credit (Amount carried to Form 7805-A)	Account Credited: Ledger, Page, and Line	Due Date of Items Against Which Credit Was Made	Net Amount Refundable Carried to Form 7805-A	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
X	X X	TOTALS OF 32 ITEMS IN THIS SCHEDULE		X X X	X	736.30			X X X	X X		X X

(Entries to be made by the Collector)

TREASURY DEPARTMENT
U.S. INTERNAL REVENUE SERVICE
Form 7806 (Continuation Sheet)
Form approved by Comptroller General
Feb. 5, 1935

1st Pa.

SCHEDULE OF OVERASSESSMENTS
AND ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

ORIGINAL
Voucher to General Accounting Office

INITIALS

Schedule No. IT-A-10274

Continuation Sheet No. 2

(Entries to be made by the Collector)

Item No.	Certificate of Overassessment or Claim Number	Name and Address of Taxpayer	Overassessments or Reductions of Tax Liability (Amount)	Ledger, Page and Line, or Account Number	Tax Liability Year	Abatement (Amount)	Overpayment (Amount)	Credit (Amount carried to Form 7805-A)	Account Credited: Ledger, Page, and Line	Due Date of Items Against Which Credit Was Made	Net Amount Refundable Carried to Form 7805-A	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
26	663846	Montgomery Trust Co.	104 63		21		104 63				104 63	O.A.
27	646309	Murphy, John A.	5,655 37		19		5655 37				5655 37	
28	646310	Murphy, Joseph L.	3,843 50		19		3843 50				3843 50	
29	663922	Murphy, Margaret	35,054 85		19		35054 85				35054 85	
30	649591	Peckitt, Leonard	1,350 98		17		1350 98				1350 98	
31	650945	Sweeten Wilmington Co.	30 01		17		30 01	1 25	2d 1924, July Tax Transfer	12/30/23	6 75	O.A.
32	663732	Villa Villa Amusement Co.	77 26		21		77 26				77 26	O.A.
X	X X	PAGE TOTALS ONLY		X X X	X				X X X	X X		X X

MAY 17 1924

844

Exhibit B

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 2866-A
Form approved by Comptroller General
Feb. 2, 1922

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
Commissioner of Internal Revenue.

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office

Schedule No. IT-R-10274

Sheet 1 of ..... Sheets

First Dist. of Penna.

D. C. Voucher No. 262

UNIT	NOTATIONS	DATE
AHL		10/1/24

27

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are collected as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several persons named thereon has been made by me to the purpose of such previously allowed overassessments, and no outstanding liability subject to offset or credit.

Date June 30, 1924

R. Rumbaugh
Collector, Fifth District of Pennsylvania

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 6 hereof have been found to be the refundable portions of overassessments hereinbefore allowed, and the accrued interest, if any, listed in column 8 has been found due.

Date AUG 5 1924

Deputy Commissioner.

AUTHENTICATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments hereinbefore allowed, and the accrued interest, if any, listed in column 8 has been found due. Payment may, therefore, be made in the manner directed in column 7.

Date AUG 12 1924

D H Blair
Commissioner of Internal Revenue.

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Net Amount Refundable (4)	Amount Credited (5)	(Not to be used by Collector) Interest Allowed (6)	(Not to be used by Collector) Total Refundable (7)	Date or Fiscal Payments of Amounts on which Credits were Transferred and Overassessments Paid (8)	(Not to be used by Collector) Refunding Taxes Illegally Collected 1925 and Prior Years (9)	19..... (10)	19..... (11)	Paid by Disbursing Clerk, Treas. Dept., by Check Dated Number as Follows (12)	Remarks (13)
X	X X	TOTALS OF 27 ITEMS IN THIS SCHEDULE	[illegible]	[illegible]	2356 [illegible] C	54741 34 C	X	54741 34 C			AUG 25 1924 X X	X X

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 2866-A (Continuation Sheet)
Form approved by Comptroller General
Feb. 2, 1922

INCOME TAX UNIT

SCHEDULE OF REFUNDS AND CREDITS

ORIGINAL
Voucher to General Accounting Office

INITIALS

Schedule No. IT-R-10274

Continuation Sheet No. 2

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Net Amount Refundable (4)	Amount Credited (5)	(Not to be used by Collector) Interest Allowed (6)	(Not to be used by Collector) Total Refundable (7)	Date or Fiscal Payments of Amounts on which Credits were Transferred and Overassessments Paid (8)	(Not to be used by Collector) Refunding Taxes Illegally Collected 1925 and Prior Years (9)	19..... (10)	19..... (11)	Paid by Disbursing Clerk, Treas. Dept., by Check Dated Number as Follows (12)	Remarks (13)
29	552922	Murphy, Margaret	35054 85		1057 41	36112 26	12/15/20	36112 26				
X	X X	*Page Total Only	38908 30 C		1113 38 C	40122 71 C	X	40122 71 C			X X	X X

APPENDIX.

Exhibits A and B.

Photostat copies of Schedules IT-A-10274 and IT-R-10274 (similar photostat copies of which were attached as Exhibits A and B respectively to the Commissioner's answer originally filed in the Supreme Court of the District of Columbia and thus made part of the record) are attached opposite.

Opinion of Supreme Court of the District of Columbia Filed January 2, 1925.

"I think that the action of the commissioner on May 19, as shown on Schedule I. T. A-10275, was in effect an opinion that the refund should be allowed. It was clearly within his power to modify or reverse this action up to the time of his final confirmation by his signature on the schedule after its receipt from the collector, and at this time the claim for refund was finally allowed.

The payment of interest as fixed by the statute thereupon became a mere ministerial duty and mandamus lies.

The demurrer to the answer and amendments will be sustained.

BAILEY, *J.*"

Opinion of the Court of Appeals of the District of Columbia June 1, 1925.

Before Martin, chief justice, Robb and Van Orsdel, associate justices.

Mr. Chief Justice Martin delivered the Opinion of the Court:

Appeal from the Supreme Court of the District of Columbia.

This is an appeal from a judgment of the lower court awarding to appellees, who were petitioners below, a writ of mandamus directing the appellant as Commissioner of Internal Revenue, to allow interest upon a certain refund of income taxes, in excess of that already allowed by him.

Section 1324 (a) of the Revenue Act of 1921 provided, *inter alia*, that upon the allowance of a claim for the refund of income taxes paid interest should be allowed and paid upon the total amount of the refund at the rate of one-half of 1 per centum per month to the date of the allowance. If such taxes were paid under a specific protest, setting forth in detail the basis of and reasons for the protest, the interest should run from the time when the taxes were paid; but, if no protest was made, interest should not begin to run until six months after the filing of a claim for the refund.

Article 1040 of Regulations 62, duly promulgated by the Commissioner under this act, provided that a claim for refund is "allowed," within the meaning of the foregoing provision, when "the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund."

Section 1324 (a), *supra*, was specifically repealed by the terms of section 1100 (a) of the Revenue Act of 1924, approved June 2, 1924. Section 1019 of the latter act, however, provides that upon the allowance of such refunds interest shall be allowed and paid on the amount thereof at the rate of 6 per centum per annum from the date when the taxes were paid to the date of the allowance of the refund. This section applies alike to all such refunds without regard to protest.

Article 1371 of Regulations 65, duly promulgated under this act, readopts the provision that a claim for refund is "allowed," within the meaning of the statute, "when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund."

It thus appears that, under the Revenue Act of 1921, a refund of income taxes paid without protest would bear interest only from six months after the filing of the claim for refund; whereas, under the Revenue Act of 1924, such refund, notwithstanding the absence of a protest, would bear interest from the date when the taxes were paid. Under each act the interest would run until the time of the "allowance" of the refund. The income taxes for which the present refund was allowed were paid in the year 1920, without protest, and the question is whether interest should be computed upon it according to the act of 1921, or that of 1924.

The facts in the case are admitted by the pleadings. In the year 1920 the decedent, Margaret Murphy, paid to the collector of internal revenue at Philadelphia the sum of $88,956.92 as her income taxes for the year 1919, payment being made in equal quarterly installments of $22,239,23 each, on April 15, June 16, September 15, and December 15, 1920. Afterwards, on May 18, 1923, she filed a claim with the Commissioner, alleging that the assessment was excessive, and claiming a refund. This claim was duly examined, and on May 19, 1924, the Deputy Commissioner reported an overpayment in the sum of $35,054.85, and recommended the allowance of a "reduction in tax liability" in that amount. On the same day the Commissioner issued an "authorization" to the collector at Philadelphia, notifying him that the amount aforesaid was approved and allowed as a "reduction of tax liability," and directing him to

check the item against the accounts of the taxpayer and determine whether the amount of the reduction should be abated in whole or in part, and to make any abatement warranted by the condition of said accounts for the years involved, also to examine all accounts of the taxpayer for other period, and apply the overpayment as a credit against any taxes due from her, and to report and certify to the Commissioner the net amount refundable to her. This "authorization" was duly received by the collector at Philadelphia, and on June 30, 1924, he reported that he had checked the item in question against the accounts of the taxpayer, and found the sum of $35,054.85 to be the "net amount refundable" in accordance with said reduction.

Afterwards, on August 12, 1924, the Commissioner forwarded an "authorization" to the disbursing clerk, directing him to pay to the claimant the sum of $35,054.85, together with interest in the sum of $1,057.41. The interest was computed under the terms of the Revenue Act of 1921, and accordingly ran from November 18, 1923, which was six months after the filing of the claim for refund. On August 25, 1924, a check for the aggregate sum thus authorized was delivered to the appellees, as executors of the estate of the claimant, and subsequently was cashed by them. At the same time, however, they protested to the collector against the amount of interest thus allowed, and demanded that it be computed under the Revenue act of 1924, to wit, from the dates of the quarterly payments made by the decedent in the year 1920. When this demand was rejected, the present proceeding in mandamus was begun to compel the Commissioner to authorize and require the payment of additional interest under the provisions of the latter act. The lower court sustained this claim, and entered judgment accordingly.

We agree with the judgment of the lower court.

The record discloses that no finding or order respecting the payment of interest upon the refund was made, or could have been made, by the Commissioner until June 30, 1924, at which time the collector at Philadelphia reported the result of his examination. But before that time Congress repealed section 1324 (a) of the Revenue Act of 1921; consequently the Commissioner was no longer authorized to proceed under it. After the repeal, his sole authority to order the disbursing clerk to pay interest upon such refunds was derived from section 1019 of the Revenue Act of 1924. Consequently the provisions of that section were controlling, and the interest upon this refund should have been computed accordingly.

This conclusion is not inconsistent with the statutory provision that interest upon such refunds shall run until the date of their "allowance," nor does it tend to invalidate the department's regulation that the term "allowance," when used to indicate the close of the interest period, shall signify the date "when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund." In the present instance, however, the repeal of the former act, and the enactment of the latter, before the refund in question was paid, or ordered to be paid, necessarily required that the allowance and payment should be made under the latter act.

It is our opinion, furthermore, that the acceptance by the appellees of the check issued to them by the disbursing clerk does not, under the circumstances, bar them from maintaining their present action. We think, also, that the lower court was right in requiring that the increased interest should be computed equally upon the quarterly overpayments as of the dates when the respective installments of taxes were paid. The interest, however, should be computed only to August 12, 1924; that being the date when the Commissioner

ordered the disbursing clerk to make payment of the refund.

No question of fact is involved in this case, nor is the appellant required to exercise any discretion when allowing interest upon such refunds. The duty is ministerial only, and is mandatory. Upon the facts in the case, the appellees have no other adequate remedy. They are therefor entitled to a writ of mandamus. Roberts vs. Valentine, 176 U. S. 221; Lane vs. Hoglund, 244 U. S. 174; Work vs. McAlester-Edwards Co., 252 U. S. 200.

Subject, therefore, to the modification that interest shall be computed only to August 12, 1924, the judgment of the lower court is affirmed, with costs.

Office Supreme Court, U. S.
FILED
SEP 16 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

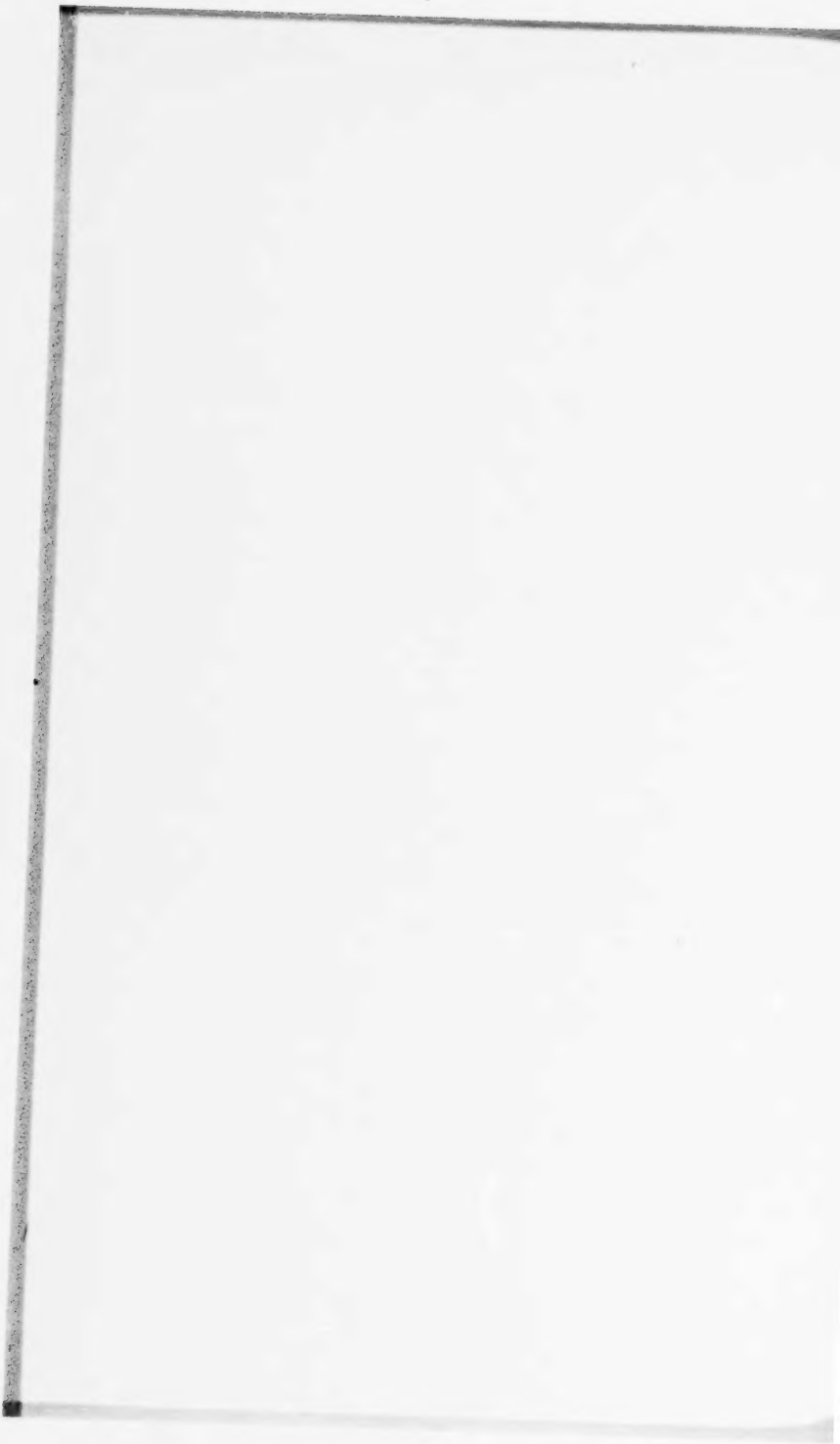
No. 713.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
UNITED STATES EX RELATIONE G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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Questions Presented

I. Does mandamus lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of Section 1019 of the Revenue Act of 1924 4

II. What was the date of "allowance" of the refund to the respondents within the meaning of Section 1019 of the Revenue Act of 1924?..... 4

Argument

I. The question whether mandamus lies in this case is not before this Court because the granting of the writ by the two courts below is not set up in the petition as one of the "reasons for granting the petition"; but in any event under the decisions of this Court mandamus is a proper remedy in this case 5

II. The refund of $35,054.85 to the respondents had not yet been allowed on June 2, 1924, and was not allowed prior to August 12, 1924..... 7

(a) Petitioner's brief is irrelevant or inaccurate almost in its entirety, and fails to substantiate a single argument or reason in support of the petition 7

(b) The decision of this Court in *Stotesbury v. United States*, 146 U. S. 196, is directly in point and conclusive in the present case... 9

III. From start to finish in this case the petitioner's position has been totally without merit in fact or in law, and his every effort has been to defeat the plain intent of Congress..... 12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 713.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

UNITED STATES EX RELATIONE G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

On June 2, 1924, by the enactment on that date of Section 1019 of the Revenue Act of 1924, it was for the first time provided that "upon the allowance of a credit or refund" of an income tax sach as was refunded to respondents on August 25, 1924, interest should in each case be paid thereon from the date of the original overpayment by the taxpayer. The sole question of importance in the present case is whether "the allowance of a * * * refund" to the respondents occurred before or after the enactment of the Revenue Act of 1924 on June 2, 1924.

The statement of facts on pages 5 to 7 of petitioner's brief is correct enough as far as it goes, but *is substantially incorrect and misleading in what it omits of the essential facts which were averred in the Commissioner's own answer in the Court below, admitted by our demurrer to that answer, and set forth in the Record at places now to be cited.*

On page 5 of his brief it states that the Commissioner, on May 19, 1924, signed a certain schedule and gave certain instructions to the Collector for the First District of Pennsylvania. It fails to state, however, that that schedule (Exhibit A, facing R. 10) as is apparent on its very face was not completed until June 30, 1924. It fails to state that those instructions to the Collector were that the $35,054.85 in the case of the respondent's taxpayer and the other similar amounts listed in column 4 of that schedule were only *over-assessments*, and were not yet known to be and were not yet listed as *overpayments*, or that columns 8, 9, 10, 11 and 12 of that schedule were not filled in or approved even in the first instance until the Collector executed his certificate on that schedule on June 30, 1924. It fails to state that the instructions to the Collector were that he should determine what part of the *over-assessments* represented mere remitting of outstanding unpaid and unsatisfied assessments, and what balances remained as actual *overpayments*. It fails to state that the instructions to the Collector were that he should then, after having ascertained what portions of the over-assessments represented over-payments, examine all accounts of each taxpayer for all other years and apply the over-payments, if any, against taxes due for other years. It fails to state that then, and not until then, he should enter the net balance in column 12 as the amount to be refunded, *and it fails to state that not until then for the first time did any officer or employe of the Bureau of Internal Revenue know what amount, if any, was to be refunded.* At the bottom of page 5 of the statement of facts in petitioner's brief reference is made to the collector preparing a new schedule of refunds (Exhibit B,

facing R. 10). But it fails to state, as shown on the face of that schedule, that it was not until August 12, 1924, that the schedule was transmitted to the Commissioner with the following certificate of the Deputy Commissioner endorsed thereon:

> "CERTIFICATE OF DEPUTY COMMISSIONER,
> Commissioner of Internal Revenue:
> The items listed in column 4 hereof have been found to be the refundable portions of over-assessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due.
> Date, Aug. 12, 1924.
>
> J. G. BRIGHT,
> *Deputy Commissioner.*"

and that it was not until August 12, 1924, that the Commissioner for the first time allowed or authorized the payment of any *refund* in this case when on that date he signed the following authorization on that same schedule:

> "AUTHORIZATION OF COMMISSIONER
> To the Disbursing Clerk, Treasury Department:
> The items listed in column 4 hereof have been found to be the refundable portions of over-assessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore be made in the amounts shown in column 7.
> Date, Aug. 12, 1924.
>
> D. H. BLAIR,
> *Commissioner of Internal Revenue.*"

THE STATUTE.

Section 1019 of the Revenue Act of 1924 (43 Stat. 346) which was approved and took effect June 2, 1924, provides:

> "Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority,

or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

QUESTIONS PRESENTED.

The questions presented by this case are not in any way affected by Section 1324 (a) of the Revenue Act of 1921 (42 Stat. 316), as erroneously suggested at pages 1 and 2 of the petition, but involve only Section 1019 of the Revenue Act of 1924 (43 Stat. 346).

Respondents, in their petition for mandamus, asked only that the Commissioner be required to compute interest according to the provisions of the Revenue Act of 1924, and alleged that certain action taken by the Commissioner subsequent to the effective date of that Act constituted an allowance of a refund within its meaning. The interpretation or application of the Act of 1921 is therefore entirely immaterial, the sole question on the merits being whether the Commissioner allowed the refund after the effective date of the Act of 1924, i.e., June 2, 1924 (Section 1104, 43 Stat. 353).

The questions should, therefore, be restated as follows:

I. *Does mandamus lie to compel the Commissioner of Internal Revenue to compute additional interest upon a refund of taxes under the provisions of Section 1019 of the Revenue Act of 1924?*

II. *What was the date of "allowance" of the refund to the respondents within the meaning of Section 1019 of the Revenue Act of 1924?*

ARGUMENT.

I. The question whether mandamus lies in this case is not before this Court because the granting of the writ by the two courts below is not set up in the petition as one of the "reasons for granting the petition;" but in any event under the decisions of this Court mandamus is a proper remedy in this case.

Even if there were any real question as to a writ of mandamus being appropriate in the present case, it is apparent that the question is not one of sufficiently general importance to be urged upon this court in a petition for a writ of certiorari, as has very obviously been recognized by the Solicitor General in his failure to refer to it in any way in any of his five "reasons for granting the petition" on pages 3 to 4 of his petition.

The question was fully argued in both of the two courts below and expressly considered in the opinion of the Court of Appeals (R. 18) to which reference is made.

If, however, this Court is for any reason further interested in this question we would respectively refer to its own decision in *Roberts v. United States ex. rel. Valentine*, 176 U. S. 221, which is a case so closely in point with the present case that it would seem controlling and conclusive to the effect that mandamus is here a proper remedy. In that case the Treasurer of the United States had refused to pay certain interest which under the Act of August 13, 1894, was directed to be paid to the holders of certain audit certificates which had been redeemed under the Act of June 16, 1880. The case was practically on all fours with the present case, in both cases the question being whether the relator was entitled to interest under the provisions of an act of Congress, in that case the Act of August 13, 1894, and in the present case Section 1019 of the Revenue Act of 1924. Both acts were mandatory in their terms and left no room for the exercise of discretion in any administrative officer as to whether or not interest should be paid. In affirming the judgment of the lower court that man-

or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

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damus should issue, this Court said at page 230 (italics ours):

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. *Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform.* But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. *If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.* Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.
>
> "In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

That mandamus lies in a case like this, see also:

Lane v. Hoglund, 244 U. S. 174;
Work v. McAlester Co., 262 U. S. 200;
Smith v. Jackson, 246 U. S. 389.

II. The refund of $35,054.85 to the respondents had not yet been allowed on June 2, 1924, and was not allowed prior to August 12, 1924.

(a) *Petitioner's brief is irrelevant or inaccurate almost in its entirety, and fails to substantiate a single argument or reason in support of the petition.*

The petitioner's argument on pages 12 to 14 of his brief is in the first place utterly beside the point for it rests upon Section 1324 (a) of the Revenue Act of 1921, whereas respondents' whole claim in this case is expressly based upon Section 1019 of the Revenue Act of 1924. An argument such as that of petitioner on pages 12 to 14 of his brief, which does not even refer to or discuss in any way the only statute upon which the case has been based from the outset and upon which it was decided by the two courts below, can be considered as little else than an outright confession of utter inability to question the correctness of the judgments below or the soundness of the opinion of the Court of Appeals.

But not only is the brief argument urged in support of the petition subject to the criticism indicated, but it is erroneous in its assumptions in its almost every paragraph. For example, beginning at middle of page 13 it is erroneously suggested to this Court that all acts by the Commissioner subsequent to May 19, 1924, were mere routine, that the fact that claimant is entitled to a refund or credit and the amount thereof was determined when the Commissioner signed the first schedule, and that whether the allowance is liquidated by credit or by cash the interest received is the same, *every one of which suggestions is absolutely erroneous and misleading*, and to sustain this assertion it is not necessary to go back of the record.

Exhibit A (facing R. 10) shows on its very face a third

alternative of abatement (in which case no interest whatever is allowed by any statute) which is entirely ignored in petitioner's argument. Exhibit A shows that if any part of the over-assessments listed in column 4 had been found by the Collector to be unpaid and unsatisfied the overpayment which was listed by the Collector in column 8 over a month later on June 30, 1924, would have been correspondingly reduced, and necessarily follows that the *amount* of the refund or credit was not and could not have been determined and fixed when the Commissioner signed the first schedule on May 19, 1924. Exhibit B (also facing R. 10) shows not only that it was not until August 12, 1924, that the Commissioner was advised by the certificate of the Deputy Commissioner of the *amount* to be refunded but it also shows that not until the Commissioner signed the authorization to the disbursing clerk on that schedule, which he did on August 12, 1924, could one cent or refund have been paid, and that if he had never signed that authorization the refund would not have been paid to this day. Is it not absurd therefore for the petitioner to attempt to urge upon this court that both of the courts below erred when they held that the refund was not allowed prior to August 12, 1924? The further statement at the very bottom of page 13 of petitioner's brief that whether the allowance was liquidated by cash or by credit the interest received is the same is obviously contrary to the express terms of Section 1019 of the Revenue Act of 1924 which expressly provides that in the case of a credit interest runs to an entirely different date than in the case of a refund.

The comment on page 14 of petitioner's brief that the Commissioner's erroneous practice "has always been followed" is of the same nature and equally misleading when it is remembered that no interest of any sort was ever provided for in the case of either refunds or credits until the passage of the Revenue Act of 1921 on November 23, 1921, and that it was several months after that date before the Commissioner's office had established any definite practice

ADDENDUM.

Since the printing of this brief we have been advised that substantially the same question on the merits was presented in Merchants Loan & Trust Company, *et al.*, v. Smietanka, Dist. Ct. N. D. Ill., E. D., No. 33920, and that after argument and submission on written briefs Judge Lindley decided just as in the present case that the refund was not allowed and that interest did not stop on the date when the Commissioner signed the first schedule of over-assessments for transmission to the Collector, and on July 15, 1925, judgment was entered for the plaintiffs for the full amount of interest claimed.

It thus appears that three federal courts have considered this question and, after submission in each case of written briefs, unanimously reached the same decision as in the present case, while we know of no case where any Court of the United States has reached a contrary decision.

on this point, so that this information so freely volunteered to the Court should be corrected to indicate that this practice had been followed only for about *two years prior* to the bringing of the present case!

It should also be noted that this case involves no real question of interpretation of a statute, but merely one of the application of the reasonably plain terms of the statute to a procedure created, not by the statute, but by the administrative officials and subject to complete change at any time by them. It was successfully contended by the respondents in both of the courts below that the very statement of the facts themselves led inevitably to the conclusion that the Commissioner did not allow the refund in this case at any time prior to August 12, 1924, and in order to avoid repetition or undue lengthening of the present brief it is submitted in the confidence that a mere reading of the additional facts stated on pages 2 and 3 of this brief is in itself a sufficiently convincing argument on this point.

In conclusion the petitioner's brief cites certain decisions of this Court as apparently in point in the present case but very carefully and studiously avoids in any way attempting to explain just how they are in point. We cannot refrain from the comment that this is for the very good reason that they cannot be so explained. No such difficulty, however, confronts us. We believe that it has already been shown that the petition should not be granted because there has not been advanced in its support a single argument or reason which can be sustained, but before concluding this answer we desire to bring also to the attention of this Court that—

(b) *The decision of this Court in Stotesbury v. United States, 146 U. S. 196, is directly in point and conclusive in the present case.*

In that case an almost exactly similar question arose under a former regulation which provided that where a claim for refund of an internal revenue tax exceeded $250 the Commissioner should, before it was finally decided, transmit the case to the Secretary of the Treasury for his con-

sideration and advisement, just as the present regulations (T. D. 3260, 23 Treas. Dec. Int. Rev. 963) require the Commissioner similarly to transmit it to the collector for his advice as to the state of the taxpayer's accounts. The question presented was whether the Commissioner's transmittal *to* the Secretary of his certificate "that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed" constituted final award or allowance by the Commissioner, and even though the Commissioner had already ascertained the amount *that had been paid* (which in the present case he did not ascertain until the Deputy Commissioner's certificate of August 12), and even though the Commissioner had certified that the *refunding* had been *allowed* (which in the present case he did not do until August 12), this Court held, just as has been held below in this case, that there had not yet been any final award or decision by the Commissioner.

After reciting the certificate of the Commissioner:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement.
>
> A. Pleasonton, Commissioner."

and pointing out that under the same Section 3220 R. S. (under which the Commissioner still acts) it "may be conceded that the power of final decision is in the Commissioner, and that there is no appeal from him to the Secretary of the Treasury," but that it is very reasonable "that the chief financial officer of the government shall be heard by the Commissioner before a final decision is made," the opinion of this Court continues (italics ours):

> "The schedule purports to be transmited to the Secretary for consideration and advisement, in accordance with the regulations. The certificate made to the

Secretary repeats the statement. Read in the light of the seventh regulation, it is as though the Commissioner said: 'I have examined this claim, and think it should be allowed, but before final decision I await your consideration and advisement.' *Certainly, if the Commissioner was awaiting for such consideration and advisement, he was not making or intending to make a final decision.* Not only is this the plain import of the language of the schedule, but the further fact that the Commissioner did not comply with either the third, fourth, or fifth regulations emphasizes the correctness of such construction. *He made no formal certificate of his decision or judgment, with the amount in writing which should be paid back;* no entry of a decision appears in any docket; *and no list, including this award, was ever transmitted by him to the First Comptroller of the Treasury;* and the fifth regulation, surely, is within the competency of the Secretary of the Treasury. The facts that he ignored those three provisions, and that he expressly adopted the seventh regulation as the guide to his procedure, *make it perfectly clear that no final determination was made* or intended *by Commissioner Pleasonton.* Therefore, *the matter was one still pending until the action of Commissioner Douglas, on November 9, 1871, rejecting the claim.*"

This decision in itself is so closely in point that it is absolutely controlling in the present case. Here in the same way the Commissioner from May 19 to August 12 was waiting for advice from the Collector and the Deputy Commissioner, and did not, and in fact could not under the regulation, until so advised on August 12 make or transmit any formal certificate of the amount which should be paid back, and it must be concluded, in words similar to the concluding words of the Court, that the matter was one still pending at all times prior to the action of the Commissioner on August 12, 1924.

To the same general effect, that a refund is not allowed prior to the determination of the amount to be refunded, is a well established line of decisions of this Court which hold that an allowance by the Commissioner of Internal Revenue for the refund of a tax illegally collected is not

the simple passing of an ordinary claim by an ordinary accounting officer but an award upon which an action may be brought, and which is conclusive unless impeached for fraud or mistake:

United States v. Kaufman, 96 U. S. 567;
United States v. Savings Bank, 104 U. S. 728;
Louisville v. United States, 169 U. S. 249.

III. From start to finish in this case the petitioner's position has been totally without merit in fact or in law, and his every effort has been to defeat the plain intent of Congress.

The Commissioner's whole effort has been, by one technical objection after another, to stop the running of interest at the earliest possible date and as many months as possible before the actual payment of the refund. He has persistently sought thus to defeat the legislative intent in the face not merely of the provisions of Section 1019, which we believe do not permit his construction, but also of the purpose of Congress so definitely expressed in the reports of both of the Committees which drafted that section, viz., that (italics ours):

> "If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest *during the period of their retention;* and the fact of protest or a claim does not affect the merits of such an interest payment."—68th Congress, 1st Session, House Report No. 179, p. 72; Senate Report No. 398, p. 46, paragraph 3.

Since this statute, which allows compensation to a taxpayer for the loss of the use of his money while illegally retained by the Government, is obviously a remedial statute it should be construed to effectuate rather than to defeat the purpose of Congress. *Logan v. Davis*, 233 U. S. 628.

It is quite true, as stated by the petitioner at page 14 of his brief, that the general rule is that interest is not to be allowed against the Government except where there is an

express agreement to pay or statutory authority therefor. But that rule has no bearing on a case where, as here, Congress has seen fit to enact express legislation providing for the payment by the Government of interest on the large amount of moneys erroneously collected and refunded by it under the income tax laws.

It is common knowledge that the Government under the new forms of income taxes enacted during the war illegally exacted large sums from taxpayers before these new laws were fully construed by Commissioner and the courts, and also that taxpayers in many instances in ignorance of their rights under the complicated laws and regulations voluntarily overpaid their taxes. In the Revenue Act of 1921 Congress recognized that since the Government had had the use of money rightfully belonging to the taxpayer and the taxpayer had been deprived of its use it was only fair that interest should be paid as compensation to the taxpayer, and in that act for the first time provided that interest should be paid subject to several important limitations. In the Revenue Act of 1924, however, Congress gave full recognition to the moral obligation of the government to pay interest, and provided that interest should be paid on all refunds, regardless of whether or not a claim had been filed by the taxpayer, and in every case for the entire period from the date of the original overpayment of tax to that of the allowance of the refund.

In the face of the plain terms of Section 1019 of the Revenue Act of 1924, and of the conditions which brought about its enactment and the unanimous expression as to its purpose embodied in the report of the committees of both houses of Congress, it is not for the Commissioner or any other administrative officer to seek to defeat the purpose of Congress that taxpayers should be compensated by interest on moneys improperly held by the Government "during the period of their retention" and to attempt to stop the interest months before the end of that period.

In concluding the discussion of the case from a technical or legal standpoint it seems proper also to thus bear in mind that the Commissioner's position is totally without merit from an equitable or just standpoint, is contrary to the spirit and purpose of the statute, and is incompatible with any presumption that Congress has sought to deal fairly with taxpayers by paying for benefits received at their expense and compensating them for the illegal retention of their money for long periods.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be denied.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

September, 1925.

(15)

FILED
APR 29 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1925.

No. 713.

DAVID H. BLAIR,
COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

vs.

UNITED STATES, EX REL. G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED,
Respondents.

BRIEF FOR RESPONDENTS.

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Counsel for Respondents.

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BRIEF FOR RESPONDENTS.

Statement.

Counsel for the respondents understand from the Solicitor General that this case will be argued and submitted in behalf of the petitioner on the Brief for the Petitioner in Opposition to Motion to Affirm. We

accept and adopt the statement of the question and of the facts in that brief, with the single exception that in the restatement of the question at the top of page 5, the emphasis should be placed on the taxes having been "*erroneously * * * collected*" rather than illegally collected.

In that brief the petitioner concedes (1) that under the recent decision of this Court in *Girard Trust Company v. United States* (March 1, 1926), the decision of the court below that the interest is to be computed under the Revenue Act of 1924 (instead of under the Revenue Act of 1921 as originally contended by petitioner) should be affirmed, and (2) that the only point remaining undecided is one which was not raised in the petition for certiorari, viz.—just how to apply the provision that interest runs *from the date the tax was paid* in a case such as this where the overpayments were of part of a tax which was paid in four quarterly installments.

We submit that the Court of Appeals was right when it held as stated in its opinion—

> "We think also that the lower court was right in requiring that the increased interest should be computed equally upon the quarterly overpayments as of the dates when the respective installments of taxes were paid." (R. 17.)

and that its decision should therefore be affirmed without modification.

Summary of Argument.

I. The Revenue Act of 1924, allows interest in this case from the date of payment of the tax which was *erroneously* or illegally assessed or collected. The

statute in force at the time the present taxes were paid plainly contemplated that the amount by which each quarterly payment exceeded one-fourth of the correct tax was erroneously assessed or collected. If the assessment or collection was *erroneous* it is immaterial whether it was also illegal (the courts recognizing a clear distinction between the use of these two terms in this connection, *Ford v. McGregor*, 20 Nev. 446; *Clay County v. Brown*, 90 Ark. 413). In stating on page 7 of his brief that "The respondents contend * * * that of each installment paid, $8,763.72, was 'illegally collected,'" petitioner entirely mistates respondent's position, just as he utterly fails to meet the real issue when he submits, as the only point on the merits in his brief, that "There was no tax illegally collected before the amount of the correct tax had been paid."

II. The Revenue Act of 1924, has an express provision which, if then in effect, would have required the interest to be computed on the excess of each quarterly payment over one-fourth of the correct tax if the excess had been determined in time to have been credited against one of the final installments. There is nothing in the law to suggest that exactly the opposite principle should be applied when the excess is refunded instead of credited, and it is plain that the law contemplates that the same principle is to be followed in both instances. *It is clear that the statute contemplates that at least as much interest is allowable when an overpayment is refunded as when it is credited.*

ARGUMENT.

I. There was an erroneous overpayment and collection of $8,763.72 when the first installment of $22,239.23 was paid on April 13, 1920, and a similar erroneous overpayment and collection in the same amount when each of the other installments were paid.

The petitioner's whole argument centers around one single but constantly recurring theme, viz.—that no part of either of the first two installments of $22,239.23 were erroneously or illegally collected because in the aggregate they were less than the correct tax. But the utter fallacy of this argument is apparent when we refer to subdivisions (a) and (b) of Section 250 of the Revenue Act of 1918, 40 Stat. 1082 (which we quote more fully, and italicise rather differently, than did the Commissioner)—

> "(a) That except as otherwise provided in this section and sections 221 and 237 *the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax.* The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. * * *
>
> (b) As soon as practicable after the return is

filed, the Commissioner shall examine it. *If it then appears that the correct amount of the tax is* greater or *less than that shown in the return, the installments shall be recomputed.* If the amount already paid exceeds that which should have been paid *on the basis of the installments as recomputed,* the *excess so paid* shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

If the petitioner relies on these sections, as he seems to in his argument, how does he explain his persistent failure and refusal to comply with the express requirement of subdivision (b)—that the installments shall be recomputed by him when he examines the return? And how can he deny what he refers to as the respondents' contention "that each of the quarterly installments paid by the taxpayer should have been $13,475.51, instead of $22,239.23?"

The petitioner has found that the correct amount actually owed was $53,902.07, and so concedes on page 7 of his brief. Under the statute which has just been quoted and under which these taxes were collected, it inevitably follows that when the petitioner examined the return and found that the total tax should be only $53,902.07, he was required by law to recompute the installments at $13,475.52, $13,475.52, $13,475.52, and $13,475.51, respectively. Under the same statute it likewise follows that—to take the first installment as an illustration—only $13,475.52 was *due* on the installment date whereas $22,239.23 was collected. Thus under the very terms of the statute there was an erroneous collection of the excess of $8,763.71,

and that much of the total tax refunded must therefore be considered as having been erroneously paid on April 13, 1920, when the first excessive installment of $22,239.23 was paid.

The statute thus clearly established each one-fourth installment as the basis of payment, and expressly contemplated that there would be an overpayment "if the amount already paid exceeds that which should have been paid *on the basis of the installments as recomputed.*" This is a clear recognition in the statute that in such case the overpayment *of each installment* had been *erroneously* collected. The basis of petitioner's objection is thus swept away and it is obvious that the judgment of the court below, resting as it does "on the basis of the installments as recomputed" is correct.

II. Section 1019 of the Revenue Act of 1924, which applies to this case, expressly contemplates that interest shall be computed proportionately from the date of the payment of each installment.

The petitioner's whole argument, as well as our own argument up to this point, has been based entirely on the Revenue Act of 1918, under which these taxes were originally paid. But Section 1019 of the Revenue Act of 1924 (43 Stat. 346) is the statute which is to be construed and applied in this case, and if we turn to it we find there a provision which fully confirms the correctness of our position and of the decision of the court below. That section provides (italics ours)—

> "Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected

without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per cent per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, *or in case of a credit, to the due date of the amount against which the credit is taken*, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

At the bottom of page 10 of his brief petitioner argues that if the taxpayer had discovered her mistake before paying the third installment and had then paid only the unpaid balance she would obviously not have been entitled to any interest on the amounts by which the installments paid exceeded one-fourth of the correct tax. If this conclusion is right then it might logically enough follow that his position in this case is sound, but by the same token, if this conclusion is wrong, then his own argument proves a boomerang and confirms our position and that of the lower court. And that it is wrong can readily be shown.

At the time the present taxes were collected and paid there was no provision for any interest of any sort on either refunds or credits, the interest here in question being provided for by Section 1019 of the later Revenue Act of 1924, which is the statute to be construed in this case. Section 270 of that Act (43 Stat. 295), provides that the quarterly installments of taxes unpaid by it shall be due on the same dates as under the earlier Acts, and Section 272 of that Act (43 Stat. 296), similarly provides—

> "If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281."

Bearing in mind that this is substantially the same as the provision of Section 250 (b) of the Act of 1918, under which an excess of an earlier installment might be credited against a later installment, we find that Section 1019 provides for interest in just such a case. It provides expressly that interest shall be paid—

> "in case of a credit, to the *due date* of the amount against which the credit is taken."

To apply this to the facts of this case. Let us take the very illustration suggested in the petitioner's brief and assume that on July 1, 1920, the Commissioner examined the return and found that the tax should have been only the same $53,902.07 which he later determined. Under Section 250 (b) of the Act of 1918, he would then have determined "the amount already paid" in excess of "that which should have been paid on the basis of installments as recomputed" (*i. e.*, $8,763.71 overpaid on April 13 and $8,763.71 overpaid on June 10), and would have credited $13,475.52 against the installment of that amount *due* on September 15, and the balance of $4,051.90 against the installment *due* on December 15. And if Section 1019 had been in effect its express provisions would have required the allowance of interest on $8,763.71 from

April 13, and on $4,711.81 from June 10, in both cases to September 15, the *due date* of the installment against which it was credited, and in the same way on $4,051.90 from June 10, to December 15.

It thus appears beyond possibility of question that Section 1019 contemplates the allowance of interest on the excess payment of each installment from the date when the installment was paid—which is exactly what we claim and what both of the two courts below decided. And as Section 1019 is the statute which is here for construction and upon which this case turns, it is submitted that the ruling of the court below was correct and should be affirmed without modification.

Respectfully submitted,

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

April, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 713.—October Term, 1925.

David H. Blair, Commissioner of Internal Revenue, Petitioner,
vs.
United States ex rel. G. Thomas Birkenstock and Gerald Ronon, Executors, etc.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[May 24, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

In 1920, Margaret Murphy, testatrix of respondents, paid without protest, to the Collector of Internal Revenue at Philadelphia, the sum of $88,956.92 as income tax for the year 1919. On May 18, 1923, a claim was filed with the Commissioner of Internal Revenue, for a refund of $35,054.85 as an overpayment of her taxes for 1919. On May 19, 1924, the Commissioner signed a "schedule of overassessment and allowance of abatement, credit and refund," in the amount claimed, and gave certain instructions to the Collector with respect to it. On a statement from the Collector that the amount claimed was subject to refund, the Commissioner, on August 12, 1924, signed an authorization to the Disbursing Clerk of the Treasury to pay to respondents the refund demanded, with interest computed from November 18, 1923 (six months after the filing of the claim for refund, as provided by § 1324 of the Revenue Act of 1921, which he deemed applicable) to May 19, 1924, the date on which the Commissioner signed the schedule of overassessment.

Respondents protested the amount of interest allowed, and demanded that it be computed on the excess of each quarterly payment from the date when it was made, in 1920, to August 12, 1924, the date upon which the Commissioner signed the authorization to the Disbursing Clerk. Upon the refusal of the Commissioner to

allow this claim, respondents petitioned the Supreme Court of the District of Columbia for a writ of mandamus to compel him to compute and allow the interest demanded. The Commissioner, the petitioner here, filed an answer to which the respondents demurred. The Supreme Court of the District sustained the demurrer and granted the writ; and upon appeal, the Court of Appeals sustained the judgment, modifying it in only one particular, not important to the decision in this case. This court granted certiorari. 269 U. S. —.

The Government having expressly waived the point made below that mandamus will not lie, only two questions are presented for consideration here. One is the date from which, the other is the date to which, interest allowed on the refund should be computed. Since the certiorari was allowed, the second question has been decided by this court in *Girard Trust Company* v. *United States*, March 1, 1926. In that case we held that the date of allowance of the refund, and therefore the date to which interest should be computed under § 1019 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 346, is the date on which the Commissioner signed the authorization to the Disbursing Clerk of the Treasury, directing him to pay the refund. The court below therefore correctly held that interest should be computed to that date, which was August 12, 1924, and that as this date was subsequent to the enactment of § 1019 of the Revenue Act of 1924, the allowance of interest must be in accordance with that section, and not § 1324 of the Act of 1921, which had been repealed. Hence we are not concerned with the ruling of the Commissioner, applying the 1921 Act, that interest ran only from six months after filing of the claim for refund, because it was based on his erroneous conclusion as to the date when the refund was "allowed".

The question remaining for decision is, from what date interest on the refund is to be computed, under § 1019 of the Act of 1924, which provides:

"Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, . . . interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax . . . was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken. . . ."

The respondents contend that as each of the quarterly instalments paid by the taxpayer was in excess of one-fourth of the proper amount of the tax for the year, interest allowed on the refund should have been computed, as the court below held, on the excess of each quarterly payment, from the date on which it was paid. But the Government argues that such an excess quarterly payment is not a "tax erroneously or illegally assessed or collected", within the meaning of § 1019, if, when it is made, any part of the proper tax for the year has not been paid; that such overpayment becomes a "tax erroneously or illegally assessed or collected", only when the amount paid, added to the previous quarterly payments, exceeds the whole tax due for the year. In support of this position, it relies on §§ 250 and 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, in force when the tax was paid. Section 250 (a) provides (p. 1082):

"That . . . the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. . . .

"The tax may at the option of the taxpayer, be paid in a single payment instead of in installments . . ."

Subdivision (b) of § 250 provides (p. 1083):

"As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

Section 252 provides (p. 1085):

"That if, upon examination of any return of income made pursuant to this Act . . . it appears that an amount of income . . . tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer . . ."

By § 250(a) the payment of the whole tax in a single payment is expressly made optional with the taxpayer, and any payment in

excess of the correct amount of a quarterly instalment is by § 250(b) to be treated as a payment on account of the whole tax. It is clear that a taxpayer who, anticipating the required quarterly instalments, pays the entire tax in one payment, is not entitled to interest or a discount, on the anticipated instalments, as upon a "tax erroneously or illegally assessed or collected" under § 1019 of the Act of 1924.

We think that under any reasonable interpretation of § 1019, the payment of a lesser amount which is in excess of the required quarterly instalments must stand on the same footing. Under §§ 250 and 252 of the Act of 1918, there is no provision for a refund to the taxpayer of any excess payment of a quarterly instalment, when the whole tax for the year has not been paid. Read together, these sections show that the mere overpayment of an instalment is treated as a payment on account of the tax which is assessed for that year, and is not a "tax erroneously or illegally assessed or collected" within the meaning of the refund provisions of § 1019 of the Act of 1924, and so is not subject to its provisions regulating the allowance of interest. Payments in excess of the total amount of the tax, then and subsequently made, are subject to refund or credit under the provisions of § 1019, and interest must be allowed on them at the rate of 6 per cent., from the date of payment.

The provision of § 1019 that "in case of a credit" interest is to be allowed "to the due date of the amount against which the credit is taken", relates to a credit properly allowed of a "tax erroneously or illegally assessed or collected," and has no application to excess payments of quarterly instalments which the Government was entitled to treat as an advance payment of later instalments, under the provisions of § 250.

The judgment below was erroneous, insofar as it allowed interest on payments made prior to September 27, 1920, on which date the total amount of the instalments paid first exceeded the total amount of tax due, by the sum of $12,815.62. Interest should have been allowed on that amount from that date, and on the full amount of the fourth instalment from December 13, 1920, when it was paid.

Judgment reversed.